

Tulsa Law Review

Volume 42
Issue 1 *Native American Natural Resources*

Fall 2006

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Recommended Citation

Kelly P. O'Neill, *Sioux Unhappy: Challenging the NCAA's Ban on Native American Imagery*, 42 Tulsa L. Rev. 171 (2013).

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SIoux UNHAPPY: CHALLENGING THE NCAA'S BAN ON NATIVE AMERICAN IMAGERY

Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

—United States Supreme Court Justice William O. Douglas¹

I. INTRODUCTION

With more than a century of competition² under its belt, the University of North Dakota (UND) athletic program has reveled in its share of victories. Men's hockey has brought seven national titles³ to Grand Forks.⁴ Women's basketball has contributed three championships,⁵ and football fielded the nation's best squad in 2001.⁶ Individual student-athletes from UND have claimed more than seventy-five titles in swimming, diving, and track and field.⁷

Much of this athletic success has been the work of student-athletes who also excelled academically. Since 1978, fifty-four UND student-athletes have earned Academic All-America status,⁸ including ten Academic All-America honorees from 2002–2006.⁹ The National Collegiate Athletic Association (NCAA), intercollegiate

1. Bernard Schwartz & Edwin D. Webb, *Administrative Law* § 10.14, 612 (2d ed., Little, Brown & Co. 1984) (quoting *U.S. v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas & Reed, JJ., dissenting)).

2. UND began sponsoring its first sport, football, in 1892. See UND Media Rels. Off., *University of North Dakota 2005 Football Media Guide* 124 (Fine Print of Grand Forks 2005).

3. UND's men's ice hockey team won titles in 1959, 1963, 1980, 1982, 1987, 1997, and 2000. See *id.* at UND-10. UND's men's and women's ice hockey teams compete at the Division I level even though the rest of the program competes at the Division II level. The NCAA is divided into three divisions with Division I being the most competitive. The three divisions have varying requirements including total number of sports offered, number of sports offered for each gender, scheduling, participation, and student-athlete financial aid. Division I is further divided into Division I-A, Division I-AA, and Division I-AAA. See NCAA, *What's the Difference between Division I, II, and III?* http://www.ncaa.org/about/div_criteria.html (accessed Jan. 29, 2007).

4. UND is located in Grand Forks, N.D. UND Media Rel. Off., *supra* n. 2, at 2. Grand Forks is “[a] community of 50,000 situated along the Red River of the North [and located seventy] miles north of Fargo, N.D., 150 miles south of Winnipeg, Manitoba, and 300 miles northwest of Minneapolis.” UND U. Rel., *About UND*, <http://www.universityrelations.und.edu/multimedia2/pdf/facts.indd.pdf> (accessed Jan. 29, 2007).

5. NCAA, *Division II Women's Basketball All-Time Championship Results*, <http://ncaasports.com/basketball/womens/story/7157724> (last updated Mar. 9, 2004). UND's women's basketball competes at the Division II level. See NCAA, <http://web1.ncaa.org/onlineDir/exec/divisionListing>.

6. UND Media Rels. Off., *supra* n. 2, at UND-10.

7. *Id.* UND's men's and women's swimming and diving and men's and women's track and field compete at the NCAA Division II level. See NCAA, <http://web1.ncaa.org/onlineDir/exec/divisionListing>.

8. College Sports Info. Dirs. of Am., *All-Time Academic All-Americans through 2004–05 (by Schools N-S)*, <http://www.cosida.com/formpdfs/AAA%20N-S.pdf> (accessed Jan. 29, 2007); see also College Sports Info. Dirs. of Am., *infra* n. 9.

9. UND Academic All-Americans include Jeff Ahlers, 2003–2004 football; Digger Anderson, 2005–2006 football; Sebastian Andersson, 2003–2004 swimming; Jenny Boll, 2002–2003 women's basketball; Kate

sports' largest governing body,¹⁰ granted its inaugural *USA Today* NCAA Foundation Academic Achievement Award to UND in 2001 because of UND's impressive student-athlete graduation rate.¹¹ In 2003, the NCAA bestowed its prestigious Walter Byers Postgraduate Scholarship¹² on a UND football student-athlete.¹³

This success has helped UND and Grand Forks build some of the finest athletic facilities in intercollegiate athletics. Ralph Engelstad Arena is one of the premiere ice hockey facilities in the nation. It seats 11,406 fans, and "[a]menities include an eight-screen video scoreboard, an adjacent Olympic-sized practice rink, a 10,000-square-foot weight room[,] and a padded leather seat for every spectator."¹⁴ The Betty Engelstad Sioux Center seats 4,000 and houses UND's men's basketball, women's basketball, and volleyball teams.¹⁵ It allows all three teams to practice at the same time, provides a players' lounge, and is equipped with a study area.¹⁶ The Hyslop Sports Center is home to the men's and women's swimming and diving teams and features "an eight-lane, [fifty]-meter swimming and diving pool."¹⁷ Grand Forks' Alerus Center functions as UND's football home on game days.¹⁸ It seats 13,500 fans and includes eighteen luxury suites, state-of-the-art scoreboards, and video replay boards.¹⁹ The NCAA has trusted UND with hosting no less than thirteen NCAA Championship events at these four facilities since 2000.²⁰

Given that the NCAA's purpose is to "promote and develop educational leadership

Cahill, 2002–2003 women's volleyball; Jeff Glas, 2005–2006 football; Danny Gagner, 2005–2006 football; Lauren Mickelson, 2005–2006 swimming; Mac Schneider, 2002–2003; Erin Sullivan, 2005–2006 tennis. College Sports Info. Dirs. of Am., *Academic All America*, <http://www.cosida.com/allamerica/default.asp> (accessed Jan. 29, 2007).

10. The NCAA has approximately 1,279 member institutions. NCAA, *Composition of the NCAA*, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (accessed Jan. 29, 2007). The only other governing body of significance among four-year institutions is the National Association of Intercollegiate Athletics which is comprised of approximately 282 institutions. Natl. Assn. of Intercollegiate Athletics, *Member Institutions*, <http://naia.collegesports.com/member-services/about/members.htm> (accessed Jan. 29, 2007).

11. Melody Lawrence, *Nine NCAA Member Institutions Chosen for Inaugural USA Today—NCAA Foundation Academic Achievement Awards*, <http://www.ncaa.org/releases/awards/2001072701aw.htm> (July 27, 2001).

12. The NCAA awards the Walter Postgraduate Scholarship to one male and one female student-athlete each year. The criteria for the award is academic excellence, community involvement, and potential as a future leader. The scholarship permits those student-athletes to pursue career interests on the graduate level. See Laronica L. Conway, *University of North Carolina, Chapel Hill and University of North Dakota Student-Athletes Receive Walter Byers Postgraduate Scholarships*, <http://www.ncaa.org/releases/awards/2003051201aw.htm> (May 12, 2003).

13. UND offensive lineman McLain "Mac" Schneider won the award in 2003. *Id.*

14. UND Athletics, *Facilities—Ralph Engelstad Arena*, <http://www.fightingsioux.com/info/facilities/rea.asp> (accessed Oct. 22, 2006).

15. *Id.* at *Facilities—Betty Engelstad Sioux Center*, <http://www.fightingsioux.com/info/facilities/betty.asp>.

16. *Id.*

17. *Id.* at *Facilities—Hyslop Sports Center*, <http://www.fightingsioux.com/info/facilities/hyslop.asp>.

18. *Id.* at *Facilities—Alerus Center*, <http://www.fightingsioux.com/info/facilities/alerus.asp>.

19. UND Athletics, *Facilities—Alerus Center*, <http://www.fightingsioux.com/info/facilities/alerus.asp>.

20. *Id.* at *Homepage*, <http://www.fightingsioux.com/>; *path* Men's Sports, *path* (choose sport); *path* Past Season Web Pages (accessed Jan. 29, 2007); NCAA, *Official 2006 Men's Basketball Records Book* 197–98 http://www.ncaa.org/library/records/basketball/m_basketball_records_book/2006/2006_m_basketball_records.pdf (accessed Jan. 29, 2007); NCAA, *2006 Men's Swimming and Diving Championship Records*, http://www.ncaa.org/library/records/swimming/2005/2005_m_swimming_champ_record.pdf 12 (accessed Jan. 29, 2007).

[and] athletics excellence,"²¹ the academic and athletic achievements of the UND athletic department and its student-athletes would seem to qualify UND as one of the NCAA's ideal institutions. So one can imagine UND's surprise on August 5, 2005, when the NCAA informed the school that it could not compete at NCAA championship events if it displayed any imagery associated with its seventy-five-year-old nickname²²—the Fighting Sioux—and that it could not host future NCAA Championship events if it kept Fighting Sioux as its nickname.²³

The conflict between the NCAA, UND, and eighteen other NCAA membership institutions²⁴ began when the NCAA placed UND on a list of colleges and universities that used what the NCAA considered to be "hostile or abusive [racial or ethnic] . . . mascots, nicknames or imagery."²⁵ In setting forth its policy, the organization targeted nineteen schools²⁶ that continued to use Native American imagery to promote their athletic teams despite public opposition to,²⁷ and the NCAA's disdain for,²⁸ this

21. NCAA Const. § 1.2, in NCAA, *2005–06 NCAA Division I Manual* 1, http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf (effective Aug. 1, 2005) [hereinafter NCAA, *Manual*].

22. UND U. Rel., *History of the Fighting Sioux Name*, <http://www.universityrelations.und.edu/logoappeal/history.html> (accessed Jan. 29, 2007).

23. NCAA, Press Release, *NCAA Executive Committee Announces Native American Mascot Appeals Decisions*, http://www2.ncaa.org/portal/media_and_events/press_room/2006/april/20060428_ec_release.html (Apr. 28, 2006).

24. NCAA, Press Release, *NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events*, http://www2.ncaa.org/media_and_events/press_room/2005/august/20050805_exec_comm_rls.html (Aug. 5, 2005).

25. NCAA, *supra* n. 23.

26. *Id.* There were originally eighteen schools on the list, but the NCAA later added the College of William and Mary. See NCAA, Press Release, *Statement by NCAA Senior Vice President for Governance and Membership Bernard Franklin on the College of William and Mary Review*, http://www2.ncaa.org/portal/media_and_events/press_room/2006/may/20060516_wandm_mascot_rls.html (May 16, 2006). Northeastern (Oklahoma) State University was inadvertently left off the list but agreed to change its nickname when the NCAA came calling in the spring of 2006; however, the school was never officially subject to the NCAA's policy. April Marciszewski, *NSU Mascot Update Sought*, *Tulsa World* A15 (Sept. 23, 2006).

27. See generally Team Spirits: *The Native American Mascots Controversy* (C. Richard King & Charles Fruehling Springwood eds., U. Neb. Press 2001).

28. In April 2001, the NCAA began investigating the use of Native American mascots in educational settings. This investigation was sparked by three occurrences: (1) the Executive Committee's review of the Confederate battle flag and whether use of the flag should have a bearing on what schools are permitted to host NCAA Championships; (2) St. Cloud State University President Roy Saigo's request to eliminate Native American mascots from intercollegiate athletics; and (3) the United States Commission on Civil Rights determination that athletic teams should not use Native American imagery because such use perpetuates racial stereotypes. NCAA, *NCAA Minority Opportunities and Interests Committee Report on the Use of American Indian Mascots in Intercollegiate Athletics to the NCAA Executive Committee Subcommittee on Gender and Diversity Issues*, http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/moic/2003/mascot_report/mascotreport.htm (Oct. 2002); see also CNN, *Mississippi Will Retain Its 107-Year-Old Flag*, <http://archives.cnn.com/2001/ALLPOLITICS/04/18/mississippi.flag/index.html> (Apr. 18, 2001); U.S. Commn. on Civ. Rights, *Statement of U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols*, <http://www.usccr.gov/press/archives/2001/041601st.htm> (Apr. 16, 2001). The Executive Committee assigned the NCAA's Minority Opportunities and Interests Committee and the Executive Subcommittee on Gender and Diversity Issues to study the issue and make recommendations to the Executive Committee. The Executive Subcommittee on Gender and Diversity Issues came back with a report and recommendations in October 2002. The NCAA requested a second report in November 2004, less than one year prior to the announcement of the NCAA's new policy, from thirty-three institutions to evaluate their campus' use of Native American imagery. The NCAA determined that fourteen of those schools complied with the league's policy by either removing references to Native American culture or keeping such references out of their athletic programs. The fourteen schools were California State University-Stanislaus (Warriors), East Stroudsburg University (Warriors), Eastern Connecticut State University (Warriors), Hawai'i-Manoa

practice.²⁹ The nineteen schools were:

- Alcorn State University Braves;
- Arkansas State University Indians;
- Bradley University Braves;
- Carthage College Redmen and Lady Reds;
- Catawba College Indians;
- Central Michigan University Chippewas;
- Chowan College Braves;
- Florida State University Seminoles;
- University of Illinois at Urbana-Champaign Fighting Illini;
- Indiana University of Pennsylvania Indians;
- University of Louisiana at Monroe Indians;
- McMurry University Indians;
- Midwestern State University Indians;
- Mississippi College Choctaws;
- Newberry College Indians;
- University of North Dakota Fighting Sioux;
- Southeastern Oklahoma State University Savages;
- University of Utah Utes; and
- College of William and Mary Tribe.³⁰

Punishments for these institutions were severe. As of February 1, 2006, schools whose student-athletes wore uniforms or utilized equipment that displayed hostile or abusive imagery were prohibited from competing in NCAA championships.³¹ As of that same date, the offending institutions would not be permitted to host NCAA championship events unless an institution was already designated a host school, and, in that case, school officials would be forced to eliminate any “hostile or abusive references” at the facility.³² As of August 1, 2008, “mascots, cheerleaders, dance

University (men are Warriors), Husson College (changed from Braves to Eagles), Lycoming College (Warriors), Merrimack College (Warriors), San Diego State University (Aztecs), Southeast Missouri State University (Redhawks), the University of West Georgia (changed from Braves to Wolves), Stonehill College (changed from Chieftains to Skyhawks), the University of North Carolina-Pembroke (men are Braves and women are Lady Braves), Winona State University (Warriors), and Wisconsin Lutheran College (Warriors). NCAA, *supra* n. 24; see Leilana McKindra, *MOIC Forwards Recommendations from Mascots Review*, <http://www.ncaa.org>; select The NCAA News, select NCAA News Archive, select 2005, select Association-wide, select MOIC forwards recommendations from mascots review 7-4-05 NCAA News (July 4, 2005). The University of North Carolina Pembroke, a school founded for the purpose of educating Native Americans, was permitted to retain its nickname because of “the foundation of the school, the history of the school and its continuous union with the Native American community.” Earl Vaughan, Jr., *NCAA Lets UNCP Keep Nickname*, Fayetteville Observer (Fayetteville, N.C.) (Aug. 6, 2005); see also U.N.C. Pembroke, *About UNCP*, <http://www.uncp.edu/uncp/about/history.htm> (accessed Jan. 29, 2007).

29. NCAA, Press Release, *supra* n. 24.

30. *Id.*

31. *Id.*

32. *Id.* The NCAA had previously stated that schools already contracted to host NCAA championship events would have to cover up any Native American imagery at the host facility. Senior vice-president Bernard Franklin stated, “[I]t is not reasonable to cover up or remove all of the Native American imagery in the [Ralph Engelstad Arena], and the restriction was adopted . . . after the contract was awarded to the university.” NCAA, Press Release, *Statement by NCAA Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review*, http://www2.ncaa.org/portal/media_and_events/press_room/2005/september/20050928_franklin_stmnt_und.html (Sept. 28, 2006).

teams,” and band members would not be permitted to participate in NCAA championships if they displayed Native American imagery on their uniforms or equipment.³³ The NCAA later extended the policy to the Bowl Championship Series (BCS),³⁴ which determines the NCAA Division I-A³⁵ football national champion, at the request of BCS officials.³⁶

The blacklisted institutions and their supporters wasted no time in crying foul. Five days after the NCAA issued its policy, Florida State University (FSU) led the way when its Board of Trustees gave the university permission to sue the NCAA for the right to continue using Seminoles as the school's mascot.³⁷ The Florida legislature³⁸ threatened to open an antitrust investigation into the NCAA.³⁹ UND quickly followed suit when Charles E. Kupchella, the university's president, submitted an open letter to the NCAA in which he stated that “the action taken by the NCAA was insulting, and a flagrant abuse of power.”⁴⁰ Even Florida Governor Jeb Bush weighed in on the highly publicized controversy when he stated, “[h]ow politically correct can we get?”⁴¹

“This is not about an effort to be politically correct,” shot back NCAA President Myles Brand in an editorial published in *USA Today*.⁴² “It is about doing the right thing.”⁴³ In his editorial, the NCAA's leader clarified possible misconceptions arising from the policy. First, members⁴⁴ of the NCAA's Executive Committee⁴⁵—not NCAA

33. NCAA, *supra* n. 24.

34. The Bowl Championship Series (BCS) is not a NCAA championship but includes the University of Notre Dame and football member schools from all Division I-A conferences: Atlantic Coast Conference, The BIG EAST Conference, Big Ten Conference, Big 12 Conference, Conference USA, Mid-American Conference, Mountain West Conference, Pacific-10 Conference, Southeastern Conference, Sun Belt Conference, and Western Athletic Conference. See Bowl Championship Series, *BCS Conferences*, <http://www.bcsfootball.org/bcsfb/conferences> (accessed Jan. 29, 2007). Schools that fell subject to the NCAA's extension of the ban to the BCS were Arkansas State University, Central Michigan University, Florida State University, Illinois, The University of Louisiana at Monroe, and The University of Utah.

35. See NCAA, *supra* n. 3.

36. BCS officials requested that the NCAA take action to extend the ban to bowl games because the BCS did not have the power to enforce such a provision. The NCAA, however, retains the right to license Division I-A football bowl games. NCAA, *Manual*, *supra* n. 21, at § 30.9, 406–07. The NCAA changed its licensing requirements, requiring “that all bowl games sign as part of the licensure process . . . a criterion saying that ‘they will follow the policy’ of not letting participating teams display Native American mascots or nicknames.” NCAA, Press Release, *Statement Regarding Licensing Criteria for Division I-A Postseason Football* http://www2.ncaa.org/media_and_events/press_room/2005/september/20050920_postseason_mascot_stmt.htm 1 (Sept. 20, 2005); see also Doug Lederman, *NCAA Extends Reach of Mascot Ban*, <http://www.insidehighered.com/news/2005/09/21/bowls> (Sept. 21, 2005); Associated Press, *NCAA Requiring Bowl Games to Ban Indian Mascots*, <http://sports.espn.go.com/ncaa/news/story?id=2167497> (posted Sept. 20, 2005).

37. Associated Press, *FSU Trustees Vote to Appeal Its Inclusion in Mascot Ban*, <http://sports.espn.go.com/ncaa/news/story?id=2130960> (updated Aug. 10, 2005).

38. FSU is well-represented politically in the form of alumni in the Florida state legislature. See Fla. Senate, *infra* n. 263; Fla. House of Reps., *infra* n. 264.

39. *Id.*

40. Ltr. from Charles E. Kupchella, Pres., UND, to NCAA, <http://www.und.edu/president/html/statements/NCAAletter.html> (Aug. 12, 2005).

41. Associated Press, *Bush Calls Seminole Mascot Ban “Ridiculous”*, <http://sports.espn.go.com/ncaa/news/story?id=2130079> (updated Aug. 12, 2005, 8:30 p.m. EDT).

42. Myles Brand, *NCAA Takes High Road with Ban of Offensive Mascots*, http://www.usatoday.com/news/opinion/editorials/2005-08-10-forum-ncaa_x.htm (Aug. 10, 2005).

43. *Id.*

44. When the NCAA set forth its policy, the nineteen members of the NCAA's Executive Committee included Ronald D. Wellman, Athletic Director, Wake Forest University; G. Wayne Clough, President,

officials—voted to put the policy in place.⁴⁶ Second, the policy did not force schools to change their nicknames or mascots even though listed schools would not be permitted to wear uniforms or use equipment with reference to Native American imagery at NCAA championship competitions.⁴⁷ Third, these institutions were permitted to appeal.⁴⁸ Finally, Brand called the policy “a teachable moment” that would bring the Native American mascot issue to the forefront of public discussion.⁴⁹

Several respected organizations supported the NCAA’s new policy. The National Congress of American Indians praised the NCAA. Tex Hall, president of the National Congress of American Indians, stated, “[t]he ridicule, mockery and utter racism Native Americans are subject to because of the use of Indian mascots are intolerable.”⁵⁰ The American Psychological Association also passed a resolution in support of banning Native American imagery from all levels of competitive athletics.⁵¹

The uproar following the announcement of the new policy was fueled by three primary concerns. First, many believed that the NCAA overstepped its bounds by forcing its political agenda on member institutions. Miami University President James C. Garland, who guided his institution through a nickname change from Redskins to RedHawks in the 1990s,⁵² commented,

[T]he NCAA clearly overstepped its mission by involving itself in the internal affairs of its member institutions. Deciding whether or not to change a nickname is a difficult decision for any school, and the beliefs and depth of emotion of all sides have to be weighed carefully. In my opinion, the NCAA is unwise to trespass into that territory.⁵³

Georgia Institute of Technology; John D. Welty, President, California State University, Fresno; Martin C. Jischke, President, Purdue University; Michael F. Adams, President, the University of Georgia; Peter Likins, President, the University of Arizona; Philip E. Austin, President, the University of Connecticut; Shirley Raines, President, the University of Memphis; Sidney McPhee, President, Middle Tennessee State University; Clinton Bristow, Jr., President, Alcorn State University; Daniel Curran, President, the University of Dayton; Robert Fisher, President, Belmont University; Walter Harrison, President, University of Hartford; Kathryn A. Martin, Chancellor, the University of Minnesota Duluth; Paul H. Engelmann, Faculty Athletics Representative, Central Missouri State University; Arthur F. Kirk, Jr., President, Saint Leo University; Ivory Nelson, President, Lincoln University (Pennsylvania); Michael Miranda, Faculty Athletics Representative, Plattsburgh State University of New York; Phillip C. Stone, President, Bridgewater College (Virginia). NCAA, *Executive Committee*, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC (accessed Oct. 21, 2005). The late Clinton Bristow, Jr., was President of Alcorn State University and voted for the policy even though his school would be affected by the policy.

45. “The Executive Committee is the highest governance body in the NCAA and is composed of institutional chief executive officers that oversee Association-wide issues. The committee is charged with ensuring that each division operates consistently with the basic purposes, fundamental policies and general principles of the Association.” NCAA, *NCAA Executive Committee*, http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/executive_committee/index.html (accessed Oct. 21, 2005).

46. Brand, *supra* n. 42.

47. *Id.*

48. *Id.*

49. *Id.*

50. Natl. Cong. of Am. Indians, *NCAI Applauds NCAA Decision to Ban Use of Indian Mascots in Postseason Activities*, [http://www.ncai.org/search “ncaa ban”](http://www.ncai.org/search%20ncaa%20ban) (Aug. 5, 2005).

51. Am. Psychol. Assn., *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations*, <http://www.apa.org/releases/ResAmIndianMascots.pdf> (accessed Jan. 29, 2007).

52. Miami U. Athletics, *RedHawk Traditions: Nickname History*, <http://muredhawks.cstv.com/trads/mioh-nickname.html> (accessed Jan. 29, 2007).

53. Peter Bronson, *Miami President Should Know: NCAA Out of Bounds on Mascots*, *Cincinnati Enquirer* 9B (Sept. 6, 2005).

In an open letter to Brand and the NCAA, Newberry College President Mitchell M. Zais, whose Indians made the list, remarked, "Mr. Brand, the NCAA has more important things to do than to try to establish itself as the arbiter of political correctness for our institutions of higher learning. . . . Get back to the job which the member institutions pay you to do."⁵⁴

Second, the ban prevented the nineteen schools, their conferences, and their home cities from reaping the financial rewards of hosting or participating in championship competition. As part of the Basketball Fund,⁵⁵ Division I⁵⁶ conferences receive money for every game in which one of their schools competes in the NCAA Men's Basketball Championship.⁵⁷ In 2005–2006, the NCAA paid \$122.8 million to conferences based on their performances in the 2000–2005 basketball championship tournaments.⁵⁸ The Big Ten Conference netted \$13,774,430 from that distribution⁵⁹—a large portion of which was courtesy of the University of Illinois' (Illinois) earning a bid to each tournament during that span,⁶⁰ including its championship-game run in 2005.⁶¹

NCAA bylaws allow institutions that host championship events to retain a portion of the profits made from those events.⁶² UND estimates that it received \$471,269 in revenues from hosting NCAA Championship events held at Ralph Engelstad Arena from October 2003 to March 2006.⁶³ The listed institutions also worried that the inability to host could affect the finances of non-revenue, Olympic sports.⁶⁴ UND representatives noted that the NCAA's "[p]olicy negatively impacts the willingness of member institutions to make the significant investment required in building facilities capable of hosting NCAA championship events."⁶⁵ Illinois' athletic director stated, "[t]he department has invested large amounts of resources in facilities, scholarships and coaches in our Olympic sports. The inability to host NCAA championship competition would have an unbelievably negative effect on our programs."⁶⁶

54. Mitchell M. Zais, *An Open Letter to Myles Brand and the NCAA*, http://www.newberry.edu/news/announcement_details.asp?ID=265 (Aug. 25, 2005).

55. This fund, which is part of the NCAA's Revenue Distribution Plan, allows the conferences of tournament participants to receive a specified amount of money for one "unit," the equivalent of one game, in which the school participates, but it excludes the title game. For example, the conferences of the sixty-four schools invited to the 2005 championship each received \$152,000 for each game in which their schools participated. NCAA, *2006–07 Revenue Distribution Plan*, http://www1.ncaa.org/finance/revenue_distribution_plan#schedule (accessed Jan. 29, 2007). In 2006–2007, the per-game amount rises to \$177,000. *Id.*

56. NCAA, *supra* n. 3.

57. NCAA, *supra* n. 55.

58. *Id.*

59. NCAA, *Division I Basketball Fund*, http://www1.ncaa.org/finance/5-yr_conf_summaries/basketball (accessed Jan. 29, 2007).

60. Ill. Athletics, *Men's Basketball Archives*, <http://fightingillini.cstv.com/sports/m-baskbl/archive/ill-m-baskbl-archive.html>; e.g. *path* 2005–2006 Season Statistics, *path* 2004–2005 Season Statistics (accessed Jan. 29, 2007).

61. *Id.* at *Results/News Releases*, <http://fightingillini.cstv.com/sports/m-baskbl/archive/ill-m-baskbl-sched-2004.html> (accessed Jan. 29, 2007).

62. See NCAA, *Manual*, *supra* n. 21, at § 31.4.4, 435.

63. Pl.'s. Memo. in Support of Mot. for Prelim. Inj. 37, <http://www.ag.nd.gov/NewsReleases/Pleadings/NCAA/Memorandum-Prelim-Injunction-state-crt.pdf> (Oct. 6, 2006).

64. Olympic sports are those that do not generate revenue. While sports that actually make money vary among schools, money-making sports are usually men's football, basketball, and ice hockey.

65. Pl.'s. Memo., *supra* n. 63.

66. NCAA *Edict Threatens Chief Illiniwek Tradition*, <http://www.news.uiuc.edu/ii/06/0504/0504.pdf> (May

The NCAA markets its championships to cities around the country with a promise that they will secure revenues if they choose to host such an event.⁶⁷ The promotional brochure provided to potential host cities makes several claims about the economic impact that hosting can have on a city.⁶⁸ Prior to hosting the 2004 NCAA Women's Volleyball Championship, Steve Goodling, President and CEO of the Long Beach Area Convention and Visitors Bureau, noted the impact that the event would have on Long Beach:

Long Beach has hosted a variety of NCAA championships, and each one has had a strong economic impact on the city. . . . This event is expected to have a \$3.6 million economic impact and bring in more than 18,000 spectators to downtown Long Beach, where more than \$1 billion in renovations and new construction has recently taken place. Everyone wins when the NCAA comes to Long Beach.⁶⁹

The NCAA's brochure, which was published in 2004, even uses an action photograph of a UND football student-athlete.

Third, the exclusion from NCAA Championships could prevent student-athletes already enrolled at the offending institutions from competing for or hosting national championships. UND's Kupchella summarized many schools' opinions:

The NCAA Constitution provides that the welfare of student-athletes is paramount, yet the policy in question would penalize student-athletes in the interest of a Committee's view on sociopolitical correctness—in some instances. The impact of earning home field advantage just to have it stripped away due to an inconsistently applied policy clearly penalizes the group that the NCAA seeks to protect—student-athletes.⁷⁰

At the time the NCAA announced its policy, four of the schools on the list—FSU, Illinois, UND, and the University of Utah—had combined to win forty-eight NCAA Division I national team titles.⁷¹ The University of Utah's female student-athletes had secured the tenth most women's titles for any school in NCAA history⁷² while the UND men's ice hockey team had the second-most championships ever in that sport.⁷³

Illinois' men's tennis team was the first team to be penalized by the NCAA's policy. The school's men's tennis squad earned a bid into the 2006 NCAA Division I Team Championship. Despite being ranked eighth in the nation,⁷⁴ earning the seventh

4, 2006).

67. NCAA, *Host Brochure* (copy on file with author).

68. *Id.*

69. *Id.*

70. Ltr. from Charles E. Kupchella, Pres., UND, to NCAA Exec. Comm., http://www.universityrelations.und.edu/logoappeal/web_assets/DOCS/ncaa_appeal_2_11042005.pdf (Nov. 4, 2005).

71. FSU has won four titles: two in men's gymnastics, one in women's indoor track and field, and one in women's outdoor track and field. Illinois has won seventeen titles: nine in men's gymnastics, five in men's outdoor track and field, two in men's fencing, and one in men's tennis. North Dakota has won seven men's ice hockey titles. Utah has won twenty titles: ten in coed skiing, nine in women's gymnastics, and one in men's basketball. See NCAA, *How Many Division I National Championships Has Your School Won?* http://www.ncaa.org/champadmin/champs_listing1.html (last verified after 2005 spring championships).

72. *Id.*

73. NCAA, *Men's Ice Hockey Division I Past Champions*, <http://www.ncaasports.com/icehockey/mens/history> (accessed Jan. 29, 2007).

74. Intercollegiate Tennis Assn., *Fila Collegiate Tennis Rankings*, http://itatennis.com/Div1Rankings/d1men_5_1_06.htm (May 1, 2006).

seed in the tournament,⁷⁵ and hosting the first and second rounds for the past seven consecutive years,⁷⁶ the team was told that it would have to travel to the University of Louisville—the home site of a lower-seeded team⁷⁷—because of Illinois' continued use of Native American imagery. "We are very disappointed that we don't have the ability to host," Illinois Coach Brad Dancer said.⁷⁸ "We'll be working on loading up the buses and getting as many Illini faithful to Louisville as possible."⁷⁹

While the outlook was grim for the eighteen offending schools, the NCAA maintained that those institutions would be allowed to appeal their potential exclusion from NCAA championships,⁸⁰ and on August 19, 2005, the NCAA published its appeals process.⁸¹ The NCAA noted that the "primary factor" in evaluating appeals would be "documentation" that "a 'namesake' tribe has formally approved of the use of the mascot, name and imagery by the institution" but added that other factors unique to each school could also be considered.⁸² Bernard Franklin, the NCAA's senior vice-president for governance and membership, would accept the appeals and would chair a staff committee composed of members designated by the Executive Committee.⁸³ That committee would then decide whether a school should remain on the NCAA's list.⁸⁴ If that appeal were to be rejected, an institution would be given the opportunity to appeal to the NCAA's Executive Committee.⁸⁵ If this second appeal was denied, an institution would be subject to the restrictions set forth in the policy.⁸⁶

Since it announced its policy on Native American imagery in August 2005, the NCAA has granted and rejected numerous appeals. Five schools were successful in all aspects of their appeals because they secured the approval of what the NCAA termed "a namesake tribe."⁸⁷ FSU,⁸⁸ The University of Utah,⁸⁹ Central Michigan University,⁹⁰

75. NCAA Sports, *2006 Division I Men's Tennis Team Championship*, http://www.ncaasports.com/tennis/mens/brackets/viewable/straight64_dyn/2006/DI (accessed Jan. 29, 2007).

76. Ill. Athletics, *Illini Draw Western Illinois in NCAA Tournament Opener*, <http://fightingillini.cstv.com/sports/m-tennis/spec-rel/050306aaa.html> (May 3, 2006).

77. It is typical for the NCAA to allow higher-seeded teams to host events that are not pre-determined. NCAA *Manual*, *supra* n. 21 at § 31.1.3.2.3, 422 ("When a championship site is not predetermined, the governing sports committee may award the site to the higher ranked team.").

78. Ill. Athletics, *supra* n. 76.

79. *Id.*

80. NCAA, *supra* n. 26.

81. NCAA, Press Release, *NCAA Executive Committee Approves Native American Mascot Review Process*, http://www2.ncaa.org/media_and_events/press_room/2005/august/20050819_mascotappeal.html (Aug. 19, 2005).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*; see also NCAA, *NCAA Governance Organization Chart*, http://www2.ncaa.org/legislation_and_governance/committees/governance_org_chart.html (accessed Jan. 29, 2007). After the NCAA denied UND's first appeal, UND thought that it had two more appeals within the NCAA, but it later learned that this was incorrect and it would only have one more appeal. Kupchella, *supra* n. 70, at 14.

86. NCAA, *supra* n. 81.

87. *Id.*

88. NCAA, Press Release, *Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review*, http://www2.ncaa.org/media_and_events/press_room/2005/august/20050823_franklinstmmtappeal.html (Aug. 23, 2005).

89. NCAA, Press Release, *Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Central Michigan University and University of Utah Reviews*, http://www2.ncaa.org/media_and_events/press_room/2005/september/20050902_cmu_utah_franklinstmmt.html

Catawba College,⁹¹ and Mississippi College⁹² all found a local tribe that would support them in the NCAA's appeals process. Catawba College student-athletes must be referred to as the "Catawba Indians."⁹³

Eleven schools have agreed to change their use of imagery, their mascots, or their nicknames. The Carthage College men's teams will go by Red Men instead of Redmen.⁹⁴ Chowan College will be known as the Hawks instead of the Braves.⁹⁵ The University of Louisiana at Monroe will use the nickname Warhawks instead of Indians.⁹⁶ Midwestern State University will be the Mustangs instead of the Indians.⁹⁷ Southeastern Oklahoma State University will use the nickname Savage Storm instead of the Savages.⁹⁸ Indiana University of Pennsylvania will now be the Crimson Hawks instead of the Indians.⁹⁹ Student-athletes at Northeastern (Oklahoma) State University—which was pressured by the NCAA to change its nickname after being inadvertently left off the original list—will be known as RiverHawks instead of Redmen.¹⁰⁰ McMurry University has decided not to use a nickname at all.¹⁰¹ The College of William and Mary Tribe reluctantly decided to take the feathers off its logo.¹⁰²

Illinois agreed to retire its controversial mascot,¹⁰³ Chief Illiniwek,¹⁰⁴ after the

(Sept. 2, 2005).

90. *Id.*

91. NCAA, Press Release, *Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Catawba College Review*, http://www2.ncaa.org/portal/media_and_events/press_room/2006/may/20060530_catawba_mascot_rls.html (May 30, 2006).

92. NCAA, Press Release, *NIT Selection Committee Meets; Excitement Builds for New Postseason Process—Regular Season Conference Champions Guaranteed of Postseason Berth*, http://www2.ncaa.org/portal/media_and_events/press_room/2006/february/20060217_miss_college_stmt.html (Feb. 17, 2006).

93. NCAA, *supra* n. 91.

94. NCAA, *Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Carthage College and Midwestern State University*, http://www2.ncaa.org/media_and_events/press_room/2005/november/20051109_carthage_midwestern_stmt.html (Nov. 9, 2005).

95. Chowan U. Athletics, *Chowan University's Newly Named Hawks Take Flight*, http://www.chowan.edu/news/athleticnews/05_06/5-4_06_mascot.htm (May 4, 2006).

96. Associated Press, *Louisiana-Monroe Scraps Indians for Warhawks*, <http://sports.espn.go.com/ncaa/news/story?id=2398643> (posted Apr. 5, 2006).

97. Associated Press, *Two Schools Comply with NCAA, Change Nicknames*, <http://sports.espn.go.com/ncaa/news/story?id=2218890> (posted Nov. 9, 2005); *see also* Midwestern State U., *Minutes—Board of Regents 11*, <http://welcome.mwsu.edu/president/pdf/feb102006minutesattachment06131.pdf> (Feb. 10, 2006).

98. Southeastern Okla. St. U., *Southeastern Unveils New "Savage Storm" Logo*, <http://www.sosu.edu/news/2006/new-sosu-athletics-logo/> (Aug. 15, 2006).

99. Ind. U. Penn., *Trustees Endorse Crimson Hawks as New Nickname, Mascot*, <http://www.iup.edu/news/releases/2006/12-15-crimson-hawks.htm> (Dec. 15, 2006).

100. April Marciszewski, *NSU: From Redmen to RiverHawks*, *Tulsa World* A14 (Nov. 15, 2006); *see also* Marciszewski, *supra* n. 26.

101. McMurry U., *McMurry Board Announces Decision*, http://www.mcm.edu/newsite/web/univ_relations/NCAA.htm (accessed Oct. 15, 2006); *see also* Associated Press, *Denied Indian Mascot, McMurry Forgoes Nickname*, <http://sports.espn.go.com/ncaa/news/story?id=2628507> (posted Oct. 16, 2006, 5:37 p.m. EDT).

102. Brian Whitson, *William and Mary to Change Athletic Logo before Fall 2007*, <http://www.wm.edu/news/?id=6870> (Oct. 10, 2006).

103. Associated Press, *Illinois Trustees Retire Chief Illiniwek Name, Image*, <http://sports.espn.go.com/ncaa/news/story?id=2796923> (updated March 13, 2007).

104. Chief Illiniwek is Illinois' mascot and may be the most documented and most controversial of all college mascots. He is known for his coordinated dances at football, basketball, and volleyball contests. He has been the subject of numerous protests and has even had a book written about him. *See* Ill. Athletics, *Chief Illiniwek*, <http://fightingillini.collegesports.com/trads/ill-trads-thechief.html> (accessed Jan. 30, 2007); *see generally* Carol Spindel, *Dancing at Halftime* (N.Y.U. Press 2000).

NCAA denied both of the school's appeals.¹⁰⁵ The NCAA also determined that Illinois could not use a logo depicting a Native American with a feathered headdress.^{106,107} The school is permitted to go by Illini or Fighting Illini because those terms are tied to the State of Illinois' name.¹⁰⁸

The most surprising of the institutions that agreed to discontinue use of Native American imagery was Newberry College. The school's president, Mitchell M. Zais, was originally one of the most vocal critics of the NCAA's policy:

Newberry College has no intention of changing its nickname. Changing at this time would indicate that we did not truly believe in the validity of our appeal, or that our moral compass was subject to be swayed by the collective opinion of the NCAA Executive Council.

Our participation in postseason play will not be affected since we have uniforms that do not bear what the NCAA deems 'offending' or 'offensive' marks. We are sorry that the NCAA feels that Newberry is unfit to host postseason play because of a nickname that our athletic teams have borne for nearly a century.¹⁰⁹

But after the football team finished the 2006 regular season with a 10–1 record¹¹⁰—the best in school history—the school's president changed his tune and acquiesced to the NCAA.¹¹¹ The school agreed to come into compliance with the NCAA's policy by the fall of 2008 if the NCAA would allow Newberry College to host NCAA championship events.

The NCAA placed Bradley University on a "Watch List" because the school no longer used Native American imagery to promote its teams with the exception of its nickname, Braves.¹¹² The NCAA will observe the school's use of Native American imagery for five years.¹¹³

Two schools have neither appealed their placement on the list nor taken any action to alter their nicknames or mascots and, therefore, remain subject to the NCAA's championship restrictions.¹¹⁴ Arkansas State University—known as the Indians—has

105. See NCAA, Press Release, *Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of Illinois, Champaign Review*, http://www.ncaa.org/wps/portal!/ut/p/kcxm/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4j3CQXJgFjGpvqRqCKOcAFfj_zcVH1v_QD9gtzQiHJHRUUA_c0tpTA!!/delta/base64xml/L3dJdyEvUUd3QndNQSEvNEIVRS82XzBfTFU!?CONTENT_URL=http://www2.ncaa.org/portal/media_and_events/press_room/2005/november/20051111_illinois_mascot_stmnt.html (Nov. 11, 2005); NCAA, *supra* n. 23.

106. *Id.*

107. Chris Creamer's Sports Logos Page, *Illinois Fighting Illini Primary* <http://www.sportslogos.net/logo.php?lo=2495> (last accessed Jan. 29, 2007).

108. *Supra* n. 104.

109. Zais, *supra* n. 54.

110. Newberry College Athletics, *Presbyterian Retains Bronze Derby, Defeats No. 9 Newberry 10–0*, <http://newberryindians.athleticsite.com/article.asp?articleID=1944> (Nov. 11, 2006).

111. Newberry College Athletics, *Newberry College Reaches Agreement with NCAA on Post-Season Events*, <http://newberryindians.athleticsite.com/article.asp?articleID=1946> (Nov. 12, 2006).

112. NCAA, Press Release, *NCAA Executive Committee Announces Native American Mascot Appeals Decision*, http://www2.ncaa.org/portal/media_and_events/press_room/2006/april/20060428_ec_release.html (Apr. 28, 2006).

113. *Id.*

114. Associated Press, *Arkansas State Still the Indians; La.-Monroe Now Called Warhawks*,

“no immediate need to change the school’s mascot.”¹¹⁵ The school has stated that it would cost \$250,000 to make the changes necessary to comply with the NCAA’s policy.¹¹⁶ Alcorn State University—nicknamed the Braves—has not commented on the NCAA’s policy in its website or in the media.¹¹⁷

That leaves UND. In October 2006, the Attorney General of North Dakota filed suit against the NCAA and requested a preliminary injunction against the application of the NCAA’s policy.¹¹⁸ The lawsuit alleges that the NCAA breached its contract with the school, breached the implied covenant of good faith and fair dealing in its contract with the school, and violated North Dakota anti-trust law.¹¹⁹ Following a hearing on the motion for injunctive relief, the North Dakota state court granted UND’s request for a temporary injunction.¹²⁰ The court later set a trial date for December 10, 2007, but urged the parties to settle.¹²¹ Both parties refuse to budge.¹²²

This comment argues that the NCAA arbitrarily and capriciously applied its policy on Native American imagery to UND—a claim which falls under UND’s allegation that the NCAA breached its implied covenant of good faith and fair dealing with UND. Part II catalogues the history of the Native American mascot controversy. Part III details the NCAA’s status as a private actor, examines its relationship with its member institutions in this context, and compares the NCAA’s application of its policy on Native American imagery to FSU—a school that won its first appeal with the NCAA—with the organization’s application of its policy to UND.

II. BACKGROUND

The controversy surrounding the use of Native American mascots in educational settings began in 1968 when the National Congress of American Indians¹²³ championed the movement to remove stereotypical Native American imagery from the media.¹²⁴ In

<http://sports.espn.go.com/espn/wire?section=ncf&id=2615004> (posted Oct. 6, 2006).

115. *Id.*

116. *Id.*

117. Searches done on <http://www.google.com>, <http://www.espn.go.com>, <http://www.alcorn.edu>, and <http://alcornsports.com> turned up nothing. It is unlikely that change will come soon as the school’s president recently passed away and the school’s athletic director is employed on an interim basis. See Alcorn State U., *Weekly Bulletin Online*, <http://www.alcorn.edu/Bulletin/20060824/> (Aug. 24, 2006); Alcorn State U. Sports, *Athletic Directory*, <http://alcornsports.com/athletic-directory.php> (accessed Jan. 29, 2007).

118. *Statement of Attorney General Wayne Stenehjem: UND Lawsuit against NCAA Filed Today*, <http://www.ag.nd.gov/documents/10-06-06.pdf> (Oct. 6, 2006).

119. Pl.’s. Memo., *supra* n. 63, at 3.

120. Joseph Marks, *UND v. NCAA: Dec. '07—Lawsuit over Fighting Sioux Nickname Won't Head to Trial for at Least a Year*, *Grand Forks Herald A1* (Dec. 16, 2006).

121. Memo. Dec. & Or., Civ. No. 06-C-1333 (Grand Forks Co. Dist. Ct., N.D. Nov. 11, 2006), (available at <http://www.ag.state.nd.us/NCAA/MemorandumDecision&Order-PreliminaryInjunction.pdf>); see also Kyle Johnson, *Court Rules in UND's Favor—Judge Grants Preliminary Injunction against NCAA*, *Grand Forks Herald A1* (Nov. 12, 2006).

122. *NCAA Won't Back Down—NCAA President Brand Talks about UND Litigation*, *Grand Forks Herald A1* (Jan. 10, 2007).

123. Founded in 1944, NCAI’s mission is to “secure . . . the rights and benefits to which [American Indians] are entitled; to enlighten the public toward the better understanding of the Indian people; to preserve rights under Indian treaties or agreements with the United States; and to promote the common welfare of the American Indians and Alaska Natives.” NCAI, *Our History*, <http://www.ncai.org/About.8.0.html> (accessed Jan. 30, 2007).

124. Am. Indian Sports Team Mascots, *Chronology: Over 35 Years of Effort Addressing the Use of*

1972, students at the University of Oklahoma pressured school authorities into halting the appearances of Little Red, a man who danced while wearing traditional Native American dress, at school events.¹²⁵ Several universities followed suit as Stanford University changed from Indians to Cardinal,¹²⁶ Dartmouth College students decided to go by Big Green instead of Indians,¹²⁷ and, several years later, Syracuse University opted to use an Orange as its mascot instead of the Saltine Warrior, a prior mascot.¹²⁸ Since the early 1970s, at least twenty-three four-year colleges and universities have chosen to distance themselves from nicknames, traditions, official mascots, or unofficial mascots that could be traced back to Native American history.¹²⁹ This number does not include those schools that decided to change after being subjected to the NCAA's policy.

Universities with non-Native American mascots or nicknames have also taken a stand on the practice. The NCAA praised two such schools for their policies against the use of Native American imagery during athletic events held on their campuses.¹³⁰ The University of Iowa¹³¹ and the University of Wisconsin¹³² do not schedule athletic contests against universities that use Native American imagery in promoting their teams or allow such imagery on their campuses. The University of Iowa's policy provides,

American Indian Related Sports Team Mascots, <http://aistm.org/fr.chronology.htm> (accessed Feb. 16, 2007) (citing Arlene Hirschfelder & Martha Kreipe de Montañó, *The Native American Almanac* 142-43 (Prentice Hall 1998)).

125. The tradition of Little Red began when white students attempted to mimic Native American dance while wearing what was thought to be Native American clothing. After dissention by Native American students, the university had Native Americans dress up and dance. Still unsatisfied, Native American students formed a chapter of the Native Indian Youth Council and protested the use of the mascot by conducting a sit-in in front of the university president's office. Little Red was retired soon thereafter. See Suzan Shown Harjo, *Chief Offenders*, http://www.nativepeoples.com/site/np_features/np_articles/1999_summer_article/su99-mascots.html (accessed Jan. 30, 2007).

126. Stanford U. Athletics, *What Is the History of Stanford's Mascot and Name?* <http://gostanford.collegesports.com/school-bio/stan-nickname-mascot.html> (accessed Jan. 30, 2007).

127. Dartmouth College Athletics, *The "Big Green" Nickname*, http://dartmouthsports.com/ViewArticle.dbml?DB_OEM_ID=11600&ATCLID=590538 (accessed Jan. 30, 2007). Although school officials ordered that the school completely disassociate itself with the Indians nickname three decades ago, some Dartmouth College students and alumni still use the Indians nickname and logo. See e.g. Dartmouth Review, *Indian Store*, <http://www.dartreview.com/store/> (accessed Jan. 28, 2007). Additionally, several events on the Dartmouth campus in 2006 showed that the school's ties to its Native American connection have yet to be severed, including the sale of t-shirts depicting the mascot of the College of the Holy Cross, a crusader, performing oral sex on an Indian. Marcella Bombardieri, *Criticism of Team's Name Heats up Dartmouth Game*, Boston Globe B1 (Dec. 29, 2006). Dartmouth College and UND officials also verbally sparred after the Dartmouth College men's ice hockey team invited UND to compete in a tournament. Josie Harper, Dartmouth College's athletics director, offered "a sincere apology to the Native American community, and the Dartmouth community as a whole," and referred to the game as "an event that will understandably offend and hurt people within our community." Josie Harper, *Apology for Hockey Tournament Mascot*, The Dartmouth <http://www.thedartmouth.com/article.php?aid=2006112102030> (Nov. 21, 2006). UND's Kupchella responded by asking Harper not "to deflect [her] problems on the University of North Dakota." Bombardieri, *supra*.

128. Syracuse U. Athletics, *SU's Mascot*, <http://www.suathletics.com/sports/gen/2001/mascot.asp> (accessed Jan. 30, 2007). Syracuse also employs Orangemen and Orangewomen when discussing its athletic teams.

129. See Am. Indian Sports Team Mascots, *supra* n. 124.

130. NCAA, *supra* n. 23.

131. U. Iowa, *Policy Manual of the Presidential Committee on Athletics* 18 (June 21, 2005) (copy on file with author).

132. The University of Wisconsin's policy discourages visiting athletic opponents from bringing Native American mascots on the campus and visiting bands and cheerleaders from performing war chants, opposes the sale of gear donning Native American logos, and requires that athletic teams not schedule contests against institutions that use Native American mascots or logos. See U. Wis. Am. Indian Student Academic Servs., *University of Wisconsin Athletic Department Policy on Native American Logos and Names*, <http://www.lssaa.wisc.edu/aisas/policy.php> (Sept. 19, 1993).

"[i]t is the view of the [Presidential Committee on Athletics] that the use of Native American mascots by athletic teams is demeaning and offensive. The use of dance, music, symbols, or other behavioral representations of Native Americans trivializes that culture and is also offensive."¹³³ While those two schools are members of the Big Ten Conference with Illinois¹³⁴ and must compete against Illinois dozens of times each year¹³⁵ as members of the same conference, they do not allow Illinois' mascot, Chief Illiniwek, to come on their campuses.¹³⁶

The campaign to end the use of Native American imagery in nicknames and mascots in educational settings has not been limited to colleges and universities. Over 125 school districts and elementary, middle, and high schools have stopped using Native American mascots in the past thirty years.¹³⁷ Since 1997, education boards for the State of New York,¹³⁸ the State of Michigan,¹³⁹ and the City of Los Angeles¹⁴⁰ have supported the elimination of Native American imagery in public schools. The City of Los Angeles Board of Education found that the use of Native American mascots "evokes negative images that become deeply embedded in the minds of students" and depicts "American Indians in inaccurate, stereotypic, and often violent manners."¹⁴¹

The area with the least amount of success has been the professional sports arena. Most high-profile professional sports teams have kept Native American nicknames and mascots. These teams include the Atlanta Braves,¹⁴² the Chicago Blackhawks,¹⁴³ the Cleveland Indians,¹⁴⁴ the Kansas City Chiefs¹⁴⁵ and the Washington Redskins.¹⁴⁶ Several Major League Baseball farm teams¹⁴⁷ have retained Native American nicknames and logos including the Cleveland Indians' single-A Kinston Indians,¹⁴⁸ the Cleveland

133. U. Iowa, *supra* n. 131.

134. Big Ten Conf., *About the Big Ten*, <http://bigten.cstv.com/school-bio/big10-school-bio.html> (accessed Jan. 30, 2007).

135. Ill. Athletics, *Composite Schedule*, <http://fightingillini.cstv.com/calendar/events/> (accessed Jan. 30, 2007).

136. U. Iowa, *supra* n. 131; U. Wis. Am. Indian Student Servs., *supra* n. 133; see also Retire the Chief, *Chief Illiniwek History*, <http://www.retirethechief.org/Documents/chief-timeline.html> (accessed Jan. 30, 2007).

137. Some Native American groups publish lists of schools that have retired their use of Native American mascots. See e.g. Am. Indian Sports Team Mascots, *Trailblazers*, <http://aistm.org/fr.trailblazers.htm> (accessed Jan. 30, 2007).

138. Ltr. from Richard P. Mills, SUNY, to Pres. of Bds. of Educ., <http://www.aistm.org/2001nysed.htm> (Apr. 5, 2001).

139. Mich. St. Bd. of Educ., *Resolution: Use of American Indian Mascots, Nicknames and Logos*, http://www.michigan.gov/documents/mascots_69612_7.res.pdf (June 26, 2003).

140. L.A. Bd. of Educ., *Special Meeting Minutes*, <http://www.lausd.k12.ca.us/lausd/board/secretary/html/agendas/min/mn09-08-97.html> (Sept. 8, 1997).

141. *Id.*

142. Atlanta Braves, *The Atlanta Braves Official Site*, http://atlanta.braves.mlb.com/NASApp/mlb/index.jsp?c_id=atl (accessed Jan. 30, 2007).

143. Chi. Blackhawks, *The Chicago Blackhawks Official Website*, <http://www.chicagoblackhawks.com/> (accessed Jan. 30, 2007).

144. Cleveland Indians, *The Cleveland Indians Official Site*, http://cleveland.indians.mlb.com/NASApp/mlb/index.jsp?c_id=cle (accessed Jan. 30, 2007).

145. Kansas City Chiefs, *KC Chiefs Online*, <http://www.kcchiefs.com/> (accessed Jan. 30, 2007).

146. Wash. Redskins, *Official Site*, <http://www.redskins.com/> (accessed Jan. 30, 2007).

147. *American Heritage College Dictionary* provides one definition of "farm" as "[a] minor-league club affiliated with a major-league club." *Am. Heritage College Dictionary* 495 (3d ed., Houghton Mifflin 1993).

148. Cleveland Indians, *Minor League Affiliates*, http://cleveland.indians.mlb.com/NASApp/mlb/mlb/minorleagues/team_index.jsp?c_id=cle (accessed Jan. 30, 2007).

Indians' rookie league Gulf Coast League Indians,¹⁴⁹ and the Pittsburgh Pirates' triple-A Indianapolis Indians.¹⁵⁰

There are some examples of Major League Baseball farm teams changing their nicknames. The Peoria Chiefs kept its nickname but changed its logo to a Dalmatian dressed as a fire chief.¹⁵¹ The Akron Aeros, a Cleveland Indians double-A affiliate, changed its nickname from Indians in 1996. The Syracuse Chiefs organization, the Toronto Blue Jays triple-A affiliate, changed its name to SkyChiefs in 1996. The Syracuse team reverted back to Chiefs in 2006 but the team chose to use a locomotive in its logo instead of Native American imagery.¹⁵²

Opponents of Native American imagery in schools and professional sports have used the courts to try to stop the practice of using such imagery for nicknames and mascots. School districts, universities, and professional sports teams have been put on the defensive in suits where plaintiffs attacked the use of Native American symbolism with a myriad of legal theories. The first such challenge came in 1972 when more than a dozen individuals filed suit against the Cleveland Indians Baseball Club seeking \$9 million dollars in damages and injunctive relief in requesting that the team stop using its mascot, Chief Wahoo.¹⁵³ Two of the plaintiffs, Russell Means and Jerome War Bonnet, allegedly settled the suit secretly for \$30,000.¹⁵⁴ The settlement purportedly promised the Cleveland Indians club that no other Native American individuals or organizations would sue the Cleveland Indians again.¹⁵⁵

In 1992, a group of seven Native Americans brought a group libel suit¹⁵⁶ against the Washington Redskins claiming that the Redskins logo should not receive federal trademark protection because it violated section 2(a) of the Lanham Trademark Act of 1946.¹⁵⁷ The plaintiffs called the team's logo and use of Redskins as its nickname "pejorative, derogatory, degrading, offensive, scandalous, contemptuous, disreputable, disparaging and [a] racist" designation for a Native American person.¹⁵⁸ The Trademark Trial and Appeal Board sided with the plaintiffs in holding that the trademark disparaged

149. *Id.*

150. Pitt. Pirates, *Minor League Affiliates*, http://pittsburgh.pirates.mlb.com/NASApp/mlb/mlb/minorleagues/team_index.jsp?c_id=pit (accessed Jan. 30, 2007).

151. Peoria Chiefs, *Chiefs Timeline*, <http://www.peoriachiefs.com/team/history/> (accessed Jan. 30, 2007).

152. Syracuse Chiefs, "Chiefs" Nickname Returns Full Steam Ahead, http://web.minorleaguebaseball.com/news/article.jsp?ymd=20061211&content_id=148192&vkey=pr_t552&fext=.jsp&sid=t552 (Dec. 11, 2006).

153. See Daniel J. Trainor, Student Author, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U. Ill. L. Rev. 971, 975–76.

154. Suzan Shown Harjo, *Harjo: Character and Gender in the Oglala Sioux Election*, <http://www.indiancountry.com/content.cfm?id=1096409794> (Oct. 29, 2004).

155. *Id.*

156. Group libel suits are more common in Canadian courts. Trainor, *supra* n. 153, at 975–76.

157. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1708 (P.T.O. 1999). The Lanham Act provides, "No trademark . . . shall be refused registration . . . unless it—(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." 15 U.S.C. § 1052(a) (2000).

158. Jack Achiezer Guggenheim, *Renaming the Redskins (and the Florida State Seminoles?): The Trademark Registration Decision and Alternative Remedies*, 27 Fla. St. U. L. Rev. 287, 294 (1999); accord Kristin E. Behrendt, Student Author, *Cancellation of the Washington Redskins' Federal Trademark Registrations: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?* 10 Seton Hall J. Sport L. 389, 398–99 (2000).

Native Americans.¹⁵⁹ On appeal to the District of D.C., the defendants asserted the equitable defense of laches in claiming that all of the plaintiffs were born at the time of the first Redskins' trademark in 1967, were aware of the Washington Redskins most of their lives, and slept on their rights to challenge the Redskins' logo.¹⁶⁰ The District of D.C. sided with the defendants, but in 2005, the D.C. Circuit Court of Appeals held that one of the plaintiffs was not subject to the laches defense because he was one year old in 1967 and could not have been cognizant of the Redskins' logo at that age.¹⁶¹ The D.C. Circuit remanded the case back to the District of D.C.,¹⁶² which recently denied a motion by the plaintiffs for "further, limited discovery."¹⁶³

In 1994, a woman filed suit in a Wisconsin state court claiming that the Mosinee School District discriminated against its Native American students, particularly her children, by using a Native American mascot and logo.¹⁶⁴ The plaintiffs lost in the trial court and on appeal.¹⁶⁵ The appellate court stated that the logo was not discriminatory because a reasonable person would not be offended by it and something must be offensive from a subjective and objective standard for it to be discriminatory.¹⁶⁶

The most recent lawsuit came in 2001. The plaintiffs were professors and students at Illinois who claimed that the university's mascot, Chief Illiniwek,¹⁶⁷ created a "hostile environment" for Native Americans¹⁶⁸ and wanted to contact student-athletes who were being recruited by the university to inform the student-athletes of this practice.¹⁶⁹ A member of Illinois' athletic department staff informed the plaintiffs that they were not permitted to contact prospective student-athletes pursuant to NCAA rules.¹⁷⁰ The plaintiffs sued the university's chancellor on the basis that the chancellor had violated their First Amendment rights.¹⁷¹ The plaintiffs won in the trial court¹⁷² and on appeal.¹⁷³ They continue to write letters and specifically target student-athletes being recruited by the Illinois' men's basketball program.¹⁷⁴

Courts have been lukewarm to challenges to the use of Native American mascots, nicknames, and logos, and little has been accomplished through the legal system except that two plaintiffs walked away with a small settlement and another group of plaintiffs gained permission to write letters to high school students. However, Chief Wahoo is still the logo for the Cleveland Indians,¹⁷⁵ the Washington Redskins' helmets are still

159. *Harjo*, 50 U.S.P.Q.2d at 1748.

160. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 112 (D.D.C. 2002).

161. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 48 (D.C. Cir. 2005).

162. *Id.* at 50.

163. *Pro-Football, Inc. v. Harjo*, 2006 WL 2092637 at *3 (D.D.C. July 26, 2006).

164. *Munson v. St. Superintendent of Pub. Instr.*, 1998 WL 61018 at *1 (Wis. App. Feb. 17, 1998).

165. *Id.* at *3.

166. *Id.*

167. *Supra* n. 104.

168. *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1134 (C.D. Ill. 2002).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 1137.

173. *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004).

174. Luke Winn, *When Activism and Recruiting Conflict*, http://sportsillustrated.cnn.com/si_blogs/basketball/ncaa/2006/09/when-activism-and-recruiting-conflict.html (posted Sept. 28, 2006, 1:35 a.m. EDT).

175. *Cleveland Indians, supra* n. 144.

decorated with their Indian-head logo,¹⁷⁶ students in Wisconsin's Mosinee School District are still referred to as the Indians,¹⁷⁷ and Illinois still has one of the nation's top basketball teams.¹⁷⁸ With the NCAA's policy, however, the tables have turned, and institutions of higher education that insist on utilizing Native American imagery to promote their athletic teams may have found an impenetrable opponent in the NCAA.

III. LITIGATION INVOLVING THE NCAA AND SCHOOLS SUBJECT TO THE NCAA'S RESTRICTIONS ON NATIVE AMERICAN IMAGERY AT NCAA CHAMPIONSHIPS

UND faces an uphill battle in litigation with the NCAA. The U.S. Supreme Court has determined that the NCAA is a private membership organization and not a state actor.¹⁷⁹ Since the *Civil Rights Cases* of 1883, the Court has held that private actors do not guarantee Fourteenth Amendment protections to others.¹⁸⁰ This distinction as a private actor affords a membership organization like the NCAA the opportunity to use its judgment in interpreting any bylaws set forth by its members without judicial intervention.¹⁸¹ A private organization, however, cannot act arbitrarily and capriciously in applying its bylaws to its members.¹⁸² UND claims that the NCAA breached its contractual duty of an implied covenant of good faith and fair dealing, and couched in that claim is an assertion that the NCAA arbitrarily and capriciously applied its policy on Native American imagery to UND. While this is difficult to prove, there is evidence that suggests the NCAA has not been even-handed in applying its policy.

A. *The NCAA As a Private Actor*

The NCAA is "a diverse, voluntary, unincorporated Association of four-year colleges and universities, conferences, affiliated associations and other educational institutions."¹⁸³ Until the late 1980s, there was a split of authority as to whether the NCAA was a state actor or private entity, but courts typically held that the NCAA was a state actor and had to provide its members procedural due process.¹⁸⁴ The face of intercollegiate athletics changed in 1988 when the U.S. Supreme Court handed down its

176. Wash. Redskins, *supra* n. 146.

177. Mosinee Sch. Dist., *Athletics*, <http://www.mosineeschools.org/sports/index.htm> (accessed Jan. 30, 2007).

178. The 2005–2006 Illinois men's basketball team finished the season with a 26–7 record and advanced to the second round of the NCAA tournament. See III. Athletics, 2005–06 *Cumulative Statistics*, <http://fightingillini.cstv.com/sports/m-baskbl/archive/051606aaa.html> (accessed Jan. 30, 2007).

179. *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

180. "No state shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV. Equal protection does not apply to private conduct even if it is discriminatory or wrongful. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Civil Rights Cases*, 109 U.S. 3 (1883).

181. *Ind. High Sch. Athletic Assn. v. Avant*, 650 N.E.2d 1164, 1167 (quoting *State ex rel. Givens v. Super Ct. of Marion Co.*, 117 N.E.2d 553 (Ind. 1954)) ("A voluntary association may, without direction or interference by the courts, for its government, adopt a constitution, by-laws, rules and regulations which will control as to all questions of discipline, or internal policy and management, and its right to interpret and administer the same is as sacred as the right to make them.").

182. *Tiffany v. Ariz. Interscholastic Assn.*, 726 P.2d 231, 232 (Ariz. App. Div. I 1986).

183. See NCAA, *Manual*, *supra* n. 21, at § 4.02.1, 22.

184. See John C. Weistart & Cym H. Lowell, *The Law of Sports* 34 (Bobbs-Merrill 1979) (providing the following cases as support for this contention: *Regents of U. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir. 1977); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974); *Colo. Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976)).

decision in *NCAA v. Tarkanian*.¹⁸⁵ In *Tarkanian*, the Court determined that the NCAA was a private membership organization and could promulgate and enforce its own rules without providing procedural due process protections to its members.¹⁸⁶

The facts in *Tarkanian* dated back to 1973 when Jerry Tarkanian accepted the men's basketball coaching position at the University of Nevada, Las Vegas (UNLV)¹⁸⁷ after a successful stint as the head coach at Long Beach State University.¹⁸⁸ Within six days of his arrival in Las Vegas, the NCAA reopened an investigation into the men's basketball program at UNLV.¹⁸⁹ Less than three years later, the NCAA cited UNLV's men's basketball program for thirty-eight rules violations with ten of these allegations being linked to Tarkanian.¹⁹⁰ The NCAA placed UNLV's men's basketball program on probation for two years and ordered the school to either sever its ties with Tarkanian or show cause as to why it should not receive further sanctions.¹⁹¹ In response to the NCAA's decision, UNLV ordered Tarkanian to dissociate himself from UNLV's athletic program for two years.¹⁹²

Tarkanian filed suit in state court against UNLV claiming that the school violated his procedural due process rights, and he later amended his complaint to add the NCAA as a defendant.¹⁹³ The Nevada Supreme Court determined that the NCAA was a state actor and was required to provide procedural due process protections to Tarkanian for two reasons.¹⁹⁴ First, the NCAA was comprised of state institutions or institutions supported by the federal government.¹⁹⁵ Second, the state was usually the entity that disciplines a state employee, but, in this case, the state, through UNLV, was disciplining Tarkanian only because the NCAA demanded that UNLV do so.¹⁹⁶ Therefore, the Nevada Supreme Court determined that the NCAA *and* UNLV were disciplining Tarkanian, thus making the NCAA a state actor.

The U.S. Supreme Court disagreed.¹⁹⁷ It determined that the NCAA did not change from private actor to state actor when UNLV imposed disciplinary sanctions suggested by the NCAA.¹⁹⁸ The Court determined "that the source of the legislation adopted by the NCAA is . . . the collective membership, speaking through an organization that is independent of any particular state,"¹⁹⁹ and that the NCAA did not

185. 488 U.S. 179 (1988).

186. *Id.*

187. See Kevin E. Broyles, Student Author, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 Ala. L. Rev. 487, 504 (1995).

188. Tarkanian served as men's basketball coach of Long Beach State University from 1968 to 1973 and led the 49ers to more victories than any coach before or since. Long Beach St. U. Athletics, *Coach History*, <http://www.longbeachstate.com/bko/bkc/HISTORY/coachinghistory.htm> (accessed Jan. 30, 2007).

189. Broyles, *supra* n. 187, at 504.

190. *Tarkanian*, 488 U.S. at 185–86.

191. *Id.* at 186.

192. *Id.* at 187.

193. *Id.* at 187–88.

194. *Id.* at 190.

195. *Tarkanian*, 488 U.S. at 190.

196. *Id.*

197. *Id.* at 199.

198. *Id.* at 195–98.

199. *Id.* at 193.

have a strong enough connection with any one state to be considered a state actor.²⁰⁰ The Court also reasoned that UNLV was an active participant in establishing the organization's rules and UNLV accepted those rules through its voluntary membership in the organization.²⁰¹ The Court stated:

By joining the NCAA, each member agrees to abide by and to enforce such rules.²⁰²

Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance.²⁰³

The Court maintained that UNLV retained the right to leave the organization even if the alternatives were "unpalatable,"²⁰⁴ and the university could change the rules through the NCAA's legislation process if it deemed the rules "harsh, unfair, or unwieldy."²⁰⁵

Tarkanian established that the NCAA is a private actor even though some of its members were state actors and those state actors enforce the NCAA's rules. The general rule is that a private membership organization should be permitted "to 'paddle [its] own canoe' without unwarranted interference from the courts."²⁰⁶ Courts consider decisions made by a private membership organization to be conclusive because courts do not want to substitute their judgment for the judgment of a membership's tribunal.

But there are exceptions to this rule. Courts will not allow a private entity to act mistakenly, fraudulently, collusively, or arbitrarily.²⁰⁷ While mistake, fraud, and collusion do not apply in the NCAA's application of its policy, UND may be successful in arguing that the NCAA has acted arbitrarily and capriciously²⁰⁸ in the application of its policy on the use of Native American imagery at NCAA championships.

B. Alleging That the NCAA Acted Arbitrarily and Capriciously in Applying Its Policy

The leading case involving a claim that the NCAA arbitrarily applied its rules is *NCAA v. Lasege*.²⁰⁹ Muhammed Lasege was one of a trio of talented basketball

200. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn*, 531 U.S. 288, 297 (2001) (discussing *Tarkanian*, 488 U.S. 179).

201. *Id.* at 193–94.

202. *Tarkanian*, 488 U.S. at 183.

203. *Id.* at 195.

204. *Id.* at 199 n. 19. In dictum, the Court stated that even if the NCAA had a monopoly, that did not mean its actions were under color of state law. *Id.* at 198–99.

205. *Id.* at 195.

206. *NCAA v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001); see also *Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976) ("It is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules.").

207. See *Weistart & Lowell*, *supra* n. 184, at 37–38.

208. Arbitrary is defined as "[d]epending on individual discretion; specif[ically], determined by a judge rather than by fixed rules, procedures, or law" or "a judicial decision[] founded on prejudice or preference rather than on reason or fact." *Black's Law Dictionary* 112 (Bryan A. Garner ed., 8th ed., West 2004).

209. 53 S.W.3d 77.

players²¹⁰ from Nigeria who wanted to play intercollegiate basketball in the U.S.²¹¹ The three players left their homeland for Russia because they thought it would be easier to acquire a visa to enter the U.S. from that nation.²¹² Lasege accepted an \$800 airline ticket to travel from Nigeria to Russia and signed a contract with an agent to play in Moscow's professional basketball league.²¹³ Lasege was supposed to be paid a \$9,000 annual salary, but he claimed that he only received enough money to cover his room and board.²¹⁴ There were also allegations that Lasege signed a second professional contract and received more funds for traveling and playing basketball.²¹⁵

Lasege eventually found his way to the United States, signed an athletic scholarship with the University of Louisville (Louisville) in the spring of 1999, and enrolled at the school during the 1999-2000 academic year.²¹⁶ In March of 2000, Louisville discovered Lasege's prior status as a professional athlete and declared him ineligible to play at the university.²¹⁷ Louisville requested that the NCAA reinstate Lasege's eligibility because Lasege was unaware of the NCAA's rules on amateurism prior to his arrival in the United States and because other mitigating circumstances existed.²¹⁸

The NCAA's Student-Athlete Reinstatement Staff²¹⁹ determined that Lasege had violated NCAA bylaws regarding contracts and compensation,²²⁰ the use of agents,²²¹ and preferential treatment, benefits, or services.²²² Based on these violations, the Student-Athlete Reinstatement Staff determined that Lasege could not participate in intercollegiate athletics at Louisville²²³ or any other NCAA institution.²²⁴ Louisville appealed Lasege's ineligible status, but the Division I Subcommittee on Student-Athlete

210. Benjamin Eze and Uche Okafor were the other two athletes.

211. *Lasege*, 53 S.W.3d at 80.

212. *Id.* at 81.

213. *Id.*

214. *Id.*

215. *Id.*

216. U. of Louisville Athletics, *NCAA Rules U of L's Lasege Ineligible*, <http://uoflsports.collegesports.com/sports/m-baskbl/spec-rel/111500aaa.html> (Nov. 15, 2000).

217. *Lasege*, 53 S.W.3d at 80.

218. *Id.*

219. "Subject to review by the Academics/Eligibility/Compliance Cabinet, the student-athlete reinstatement staff is authorized to apply the eligibility rules of the division." NCAA, *Manual*, *supra* n. 21, at § 21.7.6.2.3.2.3.1(a), 385.

220. NCAA Bylaw 12.2.5.1 is the same as current NCAA Bylaw 12.2.5. It provides that "[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement." *Lasege*, 53 S.W.3d at 80 n. 2; NCAA, *Manual*, *supra* n. 21, at § 12.2.5, 76.

221. NCAA Bylaw 12.3.1 is currently the same as it was when *Lasege* was decided. It provides that "[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport." *Lasege*, 53 S.W.3d at 80 n. 3; NCAA, *Manual*, *supra* n. 21, at § 12.3.1, 76.

222. NCAA Bylaw 12.1.1 provides that "[a]n individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) uses his or her athletics skill (directly or indirectly) for pay in any form in that sport." *Lasege*, 53 S.W.3d at 80 n. 4; NCAA, *Manual*, *supra* n. 21, at § 12.1.1, 70. The *Lasege* court also looked to the NCAA definition of pay and prohibited forms of pay. *Lasege*, 53 S.W.3d at 80 n. 4; NCAA, *Manual*, *supra* n. 21, §§ 12.1.1.1, 12.1.1.1.6, 70, 72.

223. *Lasege*, 53 S.W.3d at 80.

224. U. Louisville Athletics, *supra* n. 216.

Reinstatement²²⁵ denied the appeal after finding that Lasege's "violations exhibited a clear intent to professionalize."²²⁶

On November 27, 2000, Lasege and Louisville filed a motion in Kentucky state court seeking a temporary injunction requiring the NCAA to overturn its decision by reinstating Lasege's eligibility. The parties also asked the court to prohibit the NCAA from seeking restitution under NCAA Bylaw 19.8²²⁷ should an injunction be granted and later set aside or reversed.²²⁸ The trial court conducted an evidentiary hearing and found that the NCAA had acted arbitrarily in applying its own rules and that NCAA Bylaw 19.8 was invalid.²²⁹

The trial court offered four rationales for its decision.²³⁰ First, it found mitigating circumstances related to "economic and cultural disadvantages," ignorance of NCAA rules, and "elements of coercion associated with execution of the contracts."²³¹ Second, the trial court determined that the NCAA's ruling on Lasege's eligibility was inconsistent with previous cases involving similar facts to Lasege's situation and conflicted with the organization's stance on amateurism.²³² Third, the trial court found that one of the contracts Lasege signed in Russia was unenforceable because he was a minority at the time it was signed.²³³ Finally, Lasege's intent in committing these violations was not to become a professional athlete but rather to ultimately become an amateur athlete in the U.S.²³⁴ Additionally, the court determined that NCAA Bylaw 19.8 was "invalid because it prevents parties from availing themselves of the protections of the courts."²³⁵

In a scathing opinion, the Supreme Court of Kentucky vacated the injunction citing an abuse of discretion by the trial court.²³⁶ The Court determined that the trial court had improperly substituted its judgment for that of the NCAA and took issue with the court's use of mitigating evidence in examining whether Lasege had intended to compete professionally in Russia.²³⁷ The Court concluded that the trial court had unfairly tipped

225. "After the student-athlete reinstatement staff has acted on a reinstatement matter, the involved institution may appeal the decision to the Committee on Student-Athlete Reinstatement. The committee's determination shall be final, binding and conclusive and shall not be subject to further review by the Management Council or any other authority." See NCAA, *Manual*, *supra* n. 21, at § 21.7.6.2.3.2.3.1(b), 385.

226. *Lasege*, 53 S.W.3d at 81.

227. Old NCAA Bylaw 19.8 is the current NCAA Bylaw 19.7. It states that, should a court conflict with the NCAA's opinion on a student-athlete's eligibility and that court's opinion is later "voluntarily vacated, stayed or reversed" or determined by another court to be unjustified, the NCAA can seek restitution including, among other things, that team victories in which the ineligible student-athlete competed be forfeited, that the ineligible student-athlete's institution remit television receipts, and that a fine be assessed to any institution which was represented by an ineligible student-athlete. For the old Bylaw 19.8, review *Lasege*, 53 S.W.3d 89. For the new Bylaw 19.7, review NCAA, *Manual*, *supra* n. 21, at § 19.7, 350-51.

228. *Lasege*, 53 S.W.3d at 80, 86.

229. *Id.* at 80, 85.

230. *Id.* at 81-82.

231. *Id.*

232. *Id.* at 82.

233. *Lasege*, 53 S.W.3d at 82.

234. *Id.*

235. *Id.* at 86.

236. *Id.* at 84.

237. *Id.* at 85.

the scales in Lasege's favor when it neglected to consider the NCAA's perspective.²³⁸ It also concluded that the NCAA had not acted arbitrarily in applying its rules because the organization's decision was sufficiently supported by the evidence.²³⁹ The court stated, "a ruling is arbitrary . . . only where it is 'clearly erroneous,' and by 'clearly erroneous' we mean unsupported by substantial evidence."²⁴⁰

As to the trial court's invalidation of NCAA Bylaw 19.8, the court discussed how Louisville had contracted to be a member of the NCAA and abide by the NCAA's rules.²⁴¹ The court relied upon *Indiana High School Athletic Association v. Reyes*²⁴² in finding that the NCAA's restitution clause "allows for post-hoc equalization when a trial [court]" acts erroneously in balancing the competing interests of institutions which use ineligible student-athletes in competitions against those which do not.²⁴³

The *Lasege* Court's finding that the NCAA did not act arbitrarily is consistent with other legal challenges made by student-athletes and members to the organization's interpretation of its rules. In 1996, Darren Phillip filed suit in Connecticut state court seeking injunctive relief against Fairfield University and the NCAA after the NCAA determined he was academically ineligible and Fairfield University prohibited him from playing for its basketball team.²⁴⁴ Phillip claimed that the NCAA had breached its contractual duties of good faith and fair dealing by denying him the right to compete.²⁴⁵ The trial court found that the NCAA's "refusal to grant a waiver was arbitrary" because others in similar situations had been granted exceptions.²⁴⁶ However, the appellate court vacated the judgment in finding that the NCAA did not act in "bad faith simply by acting arbitrarily."²⁴⁷

The NCAA has also been alleged to have applied its rules arbitrarily towards corporate entities that are members of the NCAA. In the early 2000s, the Hispanic College Fund (HCF) brought suit against the NCAA,²⁴⁸ challenging a new NCAA rule that stated, beginning in 2002, exempted football games²⁴⁹ could only be sponsored by

238. *Lasege*, 53 S.W.3d at 85–86.

239. *Id.* at 85.

240. *Id.* (quoting *Thurman v. Meridian Mut. Ins. Co.*, 345 S.W.2d 635, 639 (Ky. 1961)).

241. *Id.* at 87.

242. 694 N.E.2d 249 (Ind. 1997).

If a school wants to enjoy the benefits of membership in the [Indiana High School Athletic Association], the school agrees to be subject to rule that permits the [Indiana High School Athletic Association] to require the school to forfeit victories, trophies, titles, and earnings if a trial court improperly grants an injunction . . . prohibiting enforcement of [Indiana High School Athletic Association] eligibility rules.

Id. at 257.

243. *Lasege*, 53 S.W.3d at 88.

244. *Phillip v. Fairfield U.*, 118 F.3d 131, 132–33 (2d Cir. 1997).

245. *Id.* at 134–35.

246. *Id.* at 135.

247. *Id.*

248. *Hispanic College Fund, Inc. v. NCAA (HCF)*, 826 N.E.2d 652 (Ind. App. 2005).

249. The HCF court described exempted football games:

Prior to 1999, the NCAA permitted Division I schools to play a maximum of eleven football games. However, a Division I school could participate once every four years in an "exempted" preseason football game, i.e., one that was certified by the Championships/Competition Cabinet and would not count toward the eleven-game limit.

members that already had contracts to televise the contests.²⁵⁰ At the time the legislation was passed, only one member—the Black Coaches Association—fell within this category.²⁵¹ In 2001, members who wanted to sponsor exempted football games appealed within the organization, and the NCAA granted their waivers for one year.²⁵² After the 2002 football season, however, the NCAA stated that only the Black Coaches Association could sponsor such contests.²⁵³ The HCF still wanted to sponsor exempted football games, so it turned to the legal system. Both in the trial court and on appeal, the NCAA was granted judgment on the pleadings.²⁵⁴ The appellate court reiterated that a court will not interfere with decisions made by a private membership organization.²⁵⁵ The court, however, went further in stating that “the actions of a voluntary membership association with respect to a member cannot be reviewed under an arbitrariness standard.”²⁵⁶ This latter claim is unsupported by any case law beyond *HCF*.

From *Lasege* to *HCF*, it is apparent that UND bears a heavy burden in trying to convince a court that the NCAA has acted arbitrarily and capriciously in applying its own rules. But the NCAA’s Native American imagery ban may be such a case.

C Whether the NCAA Acted Arbitrarily and Capriciously in the Application of Its Native American Mascot Policy to the University of North Dakota

UND asserts that the NCAA breached its contractual duty of an implied covenant of good faith and fair dealing by applying its Native American imagery policy in an arbitrary and capricious manner.²⁵⁷ A comparison between FSU, an institution whose use of Native American imagery is permitted at NCAA championships, and UND, a school whose use of Native American imagery is prohibited from NCAA championships, may convince a court that the NCAA has not applied its policy fairly.

UND has two arguments that the NCAA unjustly kept it on the list after removing FSU. First, at the time the policy was effected, the two schools held disparate power in governmental and organizational politics which inherently put UND at a disadvantage in the NCAA’s promulgation of such a policy. Second, the NCAA’s policy falls short of its goal of eliminating imagery at its championships through its use of a subjective standard which hinges upon a misapplied “namesake tribe” approval.

1. Political Considerations

The NCAA did not intend to keep FSU from hosting NCAA championship events

In January of 1999, the Division I Board of Directors adopted a proposal to eliminate after the 2002 season the certified preseason games and to establish a twelfth regular season game for those institutions that had a fourteen-week season. If a school chose to participate in a certified preseason games in 2002, it could not participate in a twelfth regular season game that year.

HCF, 826 N.E.2d 652, 654 (Ind. App. 2005).

250. *Id.* at 654.

251. *Id.* at 654–55.

252. *Id.* at 655.

253. *Id.* at 656.

254. *HCF*, 826 N.E.2d at 653–54.

255. *Id.* at 655.

256. *Id.* (citing *Reyes*, 694 N.E.2d at 256).

257. Pl.’s. Memo., *supra* n. 63.

when it issued its policy because the NCAA knew it would face legal and political challenges from a powerful contingency of FSU alumni who serve in political office. UND and other similarly-situated schools, the NCAA knew or should have known, did not have the political clout to put up the type of battle that a school like FSU could; thus, the NCAA pushed its Native American policy on those less-powerful institutions and gave a pass to FSU.

FSU was well-represented in the political landscape of the fourth-most-populated state in the United States at the time the policy was issued.²⁵⁸ FSU alumni accounted for one member of the U.S. Senate,²⁵⁹ one member of the U.S. House of Representatives,²⁶⁰ three members of the Florida Senate,²⁶¹ and twenty members of the Florida House of Representatives.²⁶² These former Seminoles held such high-ranking positions as Florida Senate majority leader,²⁶³ Florida House speaker,²⁶⁴ and Florida House minority leader.²⁶⁵ An FSU student-athlete was serving as an aide to Florida Governor Jeb Bush.²⁶⁶ The same year that the policy was issued, Governor Bush admitted to text-messaging a high school student-athlete being recruited by the FSU football team and urging that student-athlete to play for FSU.²⁶⁷ FSU's alumni have not been afraid to throw their weight around the state legislature on behalf of their alma mater.²⁶⁸ In the mid-1990s, a \$90 million facelift given to the school's football stadium was attributed to the work of FSU alumni.²⁶⁹

If the NCAA was not aware of this political power before the announcement of its policy, the NCAA became acutely aware of it when, just days after the NCAA announced its new policy, the Florida legislature debated whether it should compose a bill to protect its universities from the NCAA's ban.²⁷⁰ The FSU Board of Trustees—which is closely tied to the state's legislature—threatened an “assault” on the NCAA

258. *The World Almanac and Book of Facts 2004*, at 374 (World Almanac Books 2004) [hereinafter *World Almanac*].

259. Mel Martinez, *Biography*, <http://martinez.senate.gov/public/index.cfm?FuseAction=AboutMartinez.Biography> (accessed Jan. 30, 2007).

260. Michael Bilirakis, *About Mike*, <http://www.house.gov/bilirakis/bio.shtml> (accessed Nov. 21, 2005). Bilirakis was succeeded as a Florida representative to the U.S. House of Representatives by his son, Gus, in 2006. See Gus Bilirakis, *Biography of Congressman Gus Bilirakis*, <http://bilirakis.house.gov/bio.shtml> (accessed Jan. 30, 2007).

261. Fla. Sen., *2004–06 Senator's by Last Name*, <http://www.flsenate.gov/Legislators/>; path Senator's name (accessed Dec. 1, 2006).

262. Fla. H. Reps., *Representative for Regular Session 2006*, <http://www.myfloridahouse.gov/Sections/Representatives/representatives.aspx>; path Representative's name (accessed Dec. 1, 2006).

263. Fla. Sen., *Senate Leadership*, <http://www.flsenate.gov/Welcome/index.cfm?CFID=27260726&CFTOKEN=72059914>; path Leadership Team (accessed Jan. 30, 2007).

264. Fla. H. Reps., *Leadership Offices*, <http://www.myfloridahouse.gov/contentViewer.aspx?Category=PublicGuide&File=About%20The%20House%20--%20Leadership%20Offices.html> (accessed Jan. 30, 2007).

265. *Id.*

266. Associated Press, *Aide to Florida Gov. Bush Named Rhodes Scholar*, <http://sports.espn.go.com/ncaa/news/story?id=2231479> (posted Nov. 20, 2005, 8:28 p.m. EDT).

267. Sara Lipka, *Intense Pressure of College Sports Begins with Recruiting Process, College Athletes Tell Knight Commission*, <http://chronicle.com/daily/2006/01/2006013101n.htm> (Jan. 31, 2006).

268. Ron Matus, *Grads Build Political Clout in Legislature*, Fla. St. Times, <http://www.fsu.edu/~fstime/FS-Times/Volume2/apr97web/10apr97.html> (Apr. 10, 1997).

269. *Id.*

270. Associated Press, *supra* n. 37.

after the policy was announced.²⁷¹ The FSU Board of Trustees hired a lawyer²⁷² and threw out the words “anti-trust”—possibly to intimidate the NCAA because the organization has lost anti-trust lawsuits in previous legal challenges.²⁷³

The Seminole Tribe of Florida—which gave FSU approval to use the “Seminoles” nickname—is also conscious of this political power. All tribes rely on federal politicians because they make decisions affecting Native American communities.²⁷⁴ Native American tribes have recently begun making significant political campaign donations to lobby for their causes.²⁷⁵ Tribes know that they must maintain a strong relationship with federal and state legislatures if they are to have political support on tribal objectives such as casinos.²⁷⁶ From the late 1990s until 2001, tribal leaders devoted \$40 million to finance political campaigns—including an increase from \$128,000 in 1991 to \$2.9 million in 2000 on federal elections.²⁷⁷ The Seminole Tribe of Florida reaps financial gains from six casinos in the state²⁷⁸—money it can use to lobby state and federal government. In 2000, the Seminole Tribe of Florida donated \$325,000 to federal campaign contributions because it wanted electronic gaming machines in its casinos and the Florida State Legislature opposed the machines.²⁷⁹ The Seminole Tribe of Florida got its machines.²⁸⁰ Lending the Seminole name to one of the state’s universities—and the alma mater of powerful state and federal legislators—would be the equivalent of a free donation by the Seminole Tribe of Florida to FSU alumni and supporters who represent the people of Florida.

UND is not as powerful. While it has an alumnus representing North Dakota in the U.S. Senate²⁸¹ and an alumnus is the state’s only member of the U.S. House of Representatives,²⁸² the state ranks forty-eighth in state population, making it an afterthought in national politics.²⁸³ Native Americans comprise the state’s largest minority population and pose a more independent contingent than those in Florida.²⁸⁴ North Dakota tribes do not have to accommodate UND alumni who are North Dakota politicians as the Seminole Tribe of Florida must accommodate FSU alumni who are

271. Marc Caputo, *Noles Ready to Fight for Name*, Miami Herald D1 (Aug. 11, 2005).

272. *Id.*

273. *NCAA v. Bd. of Regents of the U. of Okla.*, 468 U.S. 85 (1981) (the NCAA’s contract to televise college football from 1982–1985 violated Sherman Act). In its lawsuit with the NCAA, UND alleged that the NCAA had violated North Dakota antitrust law—which is similar to the Sherman Act—but the court determined that UND did not establish “a substantial likelihood of prevailing on the merits of its state antitrust claim.” Memo. Dec. & Or., *supra* n. 121, at <http://www.ag.state.nd.us/ncaa/MemorandumDecision&Order-PreliminaryInjunction.pdf>.

274. See e.g. Tony Thornton, *State Tribes Could Lose Big with Proposal*, Daily Oklahoman A1 (Sept. 17, 2005).

275. *Id.*

276. Melvin Claxton & Mark Puls, *Tribes Buy Clout with Casino Cash*, <http://www.detnews.com/specialreports/2001/chippewa/1230lead/1230lead.htm> (Dec. 30, 2001).

277. *Id.*

278. Seminole Tribe of Fla., *Tourism/Enterprises*, <http://www.seminoletribe.com/enterprises/casinos.shtml> (accessed Jan. 30, 2007).

279. Claxton & Puls, *supra* n. 276.

280. *Id.*

281. Byron Dorgan, *Biography*, <http://dorgan.senate.gov/about/biography/> (accessed Jan. 30, 2007).

282. Earl Pomeroy, *Biography*, <http://www.pomeroy.house.gov/path/Biography> (accessed Jan. 30, 2007).

283. *World Almanac*, *supra* n. 258, at 374.

284. *Id.* at 354.

Florida politicians.

This disparity of power is also evident in the NCAA's infrastructure. The NCAA's Executive Committee is the NCAA's highest-ranking committee, and it deals "with issues that affect all members of the Association and perform[s] duties necessary to the ongoing operation of the Association." Half of the Executive Committee's sixteen voting members are Division I-A representatives²⁸⁵ while two voting members represent Division II.²⁸⁶ Therefore, FSU's interests as a Division I-A institution are better represented in the NCAA's Executive Committee than UND's interests as a Division II institution. It was the NCAA's Executive Committee that issued the ban on Native American imagery.²⁸⁷

An example of how this organizational structure benefits Division I²⁸⁸ schools is the NCAA Division I men's ice hockey tournament. The NCAA allows a number of Division II schools—including UND—to be considered Division I institutions for purposes of competing in men's ice hockey.²⁸⁹ Under its revenue distribution plan, however, the NCAA only shares proceeds from its Division I men's ice hockey championship with Division I institutions that compete in the tournament and not with schools that are Division I only for men's ice hockey.²⁹⁰ Division II institutions receive only enough money to cover the travel expenses of thirty-one individuals in their travel parties.²⁹¹ In 2003, the NCAA made \$1,564,927—excluding television money—on its men's ice hockey championship, but none of that was shared with Division II schools that competed for the title.²⁹² While Division II representatives did not want an arrangement where the NCAA paid their rivals and did not pay their institutions, their status as minority members in the NCAA's organizational structure afforded them little ability to change this—or any other—rule.²⁹³

FSU and its ties to national and state politicians all but guaranteed that the NCAA would let FSU off the hook in its Native American mascot ban, and it is likely that the NCAA never intended to subject FSU to such a policy because it knew it could not defeat such a well-connected school. UND, on the other hand, is a school the NCAA knew it would likely defeat. As FSU's alumni magazine stated, "[h]aving all those friends in high places . . . has been good for FSU."²⁹⁴

285. For a clarification on the requirements for each classification within the NCAA, review NCAA, *supra* note 3.

286. The NCAA Executive Committee is comprised of eight I-A member representatives, two Division I-AA member representatives, two I-AAA member representatives, two Division II member representatives, and two Division III member representatives. NCAA, *NCAA Governance Organization Chart*, *supra* n. 85.

287. NCAA, *supra* n. 24.

288. See NCAA, *supra* n. 3.

289. NCAA, *NCAA Sporting List*, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sport=MIH&division=2> (accessed Jan. 27, 2007).

290. Associated Press, *NCAA Won't Show the Money to D-II Duluth*, <http://sports.espn.go.com/ncaa/news/story?id=1777278> (posted April 7, 2004, 3:33 a.m. EDT).

291. *Id.*

292. *Id.*

293. *Id.*

294. Matus, *supra* n. 268.

2. A Comparison between FSU and UND

In its press release setting forth the appeals process for schools whose use of Native American imagery was banned from NCAA championships, the NCAA stated that its review committee would “consider all of the facts related to each institution’s appeal.”²⁹⁵ It added that “one primary factor that will be considered in the review is if documentation exists that a ‘namesake’ tribe has formally approved of the use of the mascot, name and imagery by the institution” and that other factors unique to each school could also be considered.²⁹⁶ A comparison of FSU’s and UND’s use of Native American imagery in promoting their teams will reveal three things. First, both schools violate the NCAA’s policy through the use of Native American imagery. Second, FSU’s flagrant perpetuation of Native American stereotypes through the use of historically inaccurate and possibly offensive traditions makes the Florida school a far worse offender than UND. Third, the NCAA acted arbitrarily and capriciously in granting FSU’s appeal solely because FSU had the approval of the Seminole Tribe of Florida without consulting the Seminole Nation of Oklahoma. Furthermore, the NCAA should allow UND to host NCAA championships at its new hockey and basketball facilities because construction of the facilities was not within complete control of the university but hinged on the opinions of an alumnus who donated the money for the facilities.

Should FSU and UND host or compete for an NCAA national championship using their current nicknames, both schools would violate the NCAA’s ban on Native American imagery at its championships. Both institutions have nicknames that are derived from Native American tribes—Seminoles and Fighting Sioux. Both schools have logos that depict their respective Native American nicknames with the face of an Indian.²⁹⁷ Both schools’ facilities contain numerous references to Native American imagery via their logos and other images.²⁹⁸ Fans watching an FSU home football game view the school’s logo at midfield and spears in the endzones²⁹⁹ while UND’s fans observe its logo at the center of the ice in its home arena.³⁰⁰ In fact, UND’s Fighting Sioux logo can be found at least 2,400 times in Ralph Engelstad Arena.³⁰¹

But FSU goes several steps further than UND in violating the NCAA’s policy by stereotyping Native Americans and their traditions. The most notable of FSU’s offenses is its mascot, Chief Osceola.³⁰² The school’s website describes Chief Osceola’s

295. NCAA, *supra* n. 81.

296. *Id.*

297. Chris Creamer’s Sports Logos Page, *Florida State Seminoles* <http://www.sportslogos.net/team.php?t=679> (accessed Jan. 27, 2007); UND, *Fighting Sioux Nickname Info*, <http://www.universityrelations.und.edu/logoappeal/downloads.html> (accessed Jan. 30, 2007).

298. See e.g. FSU Athletics, *Doak Campbell Stadium*, <http://seminoles.collegesports.com/trads/fsu-trads-fac-campbell.html?pic=0> (accessed Jan. 30, 2007); *id.* at *Basketball Practice Facility*, <http://seminoles.collegesports.com/genrel/091603aad.html>; *id.* at *Basketball Training Facility*, <http://seminoles.collegesports.com/facilities/fsu-basketball-training.html>; Ralph Engelstad Arena, *The Ralph*, <http://www.theralph.com/asp/default.asp?p=13> (accessed Jan. 27, 2007).

299. FSU Athletics, *Doak Campbell Stadium*, <http://seminoles.collegesports.com/trads/fsu-trads-fac-campbell.html?pic=0> (accessed Jan. 29, 2007).

300. Ralph Engelstad Arena, *supra* n. 298.

301. Memo. Dec. & Or., *supra* n. 121, at 38–39.

302. FSU Athletics, *Chief Osceola and Renegade*, <http://seminoles.collegesports.com/trads/fsu-trads-osceola.html> (accessed Jan. 27, 2007).

traditional ride to midfield prior to football contests: “[p]erhaps the most spectacular tradition in all of college football occurs in Doak Campbell Stadium when a student portraying the famous Seminole Indian leader, Osceola, charges down the field riding an Appaloosa horse named Renegade and plants a flaming spear at midfield to begin every home game.”³⁰³ This reenactment is fictitious according to current tribe members who claim that the real Chief Osceola did not have a horse named Renegade and the tribe only used horses to herd cattle.³⁰⁴ UND does not have a mascot.³⁰⁵

FSU does not stop with Chief Osceola. The second line of the school’s fight song reads, “[y]ou got to scalp ‘em Seminoles!”³⁰⁶ UND’s fight song has no Native American references in the lyrics.³⁰⁷ FSU’s fans do the “Tomahawk Chop,”³⁰⁸ a chopping motion with the right arm, which is derived from a prior cheer called “massacre.”³⁰⁹ UND students have done the “Tomahawk Chop” in the past, but the UND athletics department has cracked down on this under pressure from Native American groups.³¹⁰

FSU also falls short of UND in terms of educating Native Americans and informing its student body and supporters about issues relating to its namesake tribe. At the time the NCAA set forth its policy, UND’s student body was approximately 2.9 percent Native American³¹¹—the largest minority population on the campus—while 0.4 percent of FSU’s student body was Native American.³¹² Only fourteen members of the Seminole Tribe had ever attended FSU³¹³ and a mere three Seminoles had completed their studies at the school.³¹⁴ The school recently began actively recruiting potential students from the Seminole Tribe of Florida and offers these tribal members substantial scholarships.³¹⁵ In the fall of 2006, FSU also began offering a course titled “History of the Seminoles and Southeastern Tribes, Pre-Contact to Present” to educate all students about the school’s nickname.³¹⁶

303. *Id.* A video of Chief Osceola’s ride can be found on the FSU University Relations website. FSU U. Rel., *The Florida State Seminoles: A Tradition of Tribute*, <http://www.fsu.edu/%7eunivrel/seminoles/> (accessed Jan. 30, 2007).

304. Rodney Thrash, *FSU’s Seminole Symbols: Heritage or Heresy?* St. Petersburg Times E1 (Aug. 16, 2005) (available at http://www.sptimes.com/2005/08/16/Floridian/FSU_s_Seminole_symbol.shtml).

305. Ltr. from Charles E. Kupchella, Pres., UND, to NCAA Exec. Comm., http://www.universityrelations.und.edu/logoappeal/ncaa_appeal%20_8-30.pdf (Aug. 30, 2005).

306. Lyrics on Demand, *Florida State Lyrics*, <http://www.lyricsondemand.com/f/fightsonglyrics/floridastatefightsonglyrics.html> (accessed Jan. 30, 2007).

307. UND, *Fight on Sioux (Lyrics)*, http://www.und.edu/schoolsongs/lyrics/fighton_lyrics.html (accessed Jan. 30, 2007).

308. FSU Athletics, *The War Chant*, <http://seminoles.collegesports.com/trads/fsu-trads-chant.html> (accessed Jan. 30, 2007).

309. *Id.*

310. Steve Schmidt, *Indians Complain about Parade: Native Group Says Fraternity Float Jeered and Made Racist Comments during Parade*, Grand Forks Herald A1 (Oct. 28, 1992).

311. UND, *Student Body Profile*, <http://www.und.edu/profile/> (accessed Jan. 30, 2007).

312. FSU, *Office of Institutional Research FAQ*, http://www.ir.fsu.edu/search_help/searchinfo.asp?ID=t_fa (accessed Nov. 15, 2005).

313. Ryan Bakken, *A Lack of Support—UND Fails to Receive Nickname Endorsement by Tribes, While Many Other Colleges Succeed*, Grand Forks Herald 6A (Oct. 2, 2005).

314. FSU, *Florida State University Thanks Seminoles for Historic Vote of Support*, <http://www.fsu.edu/news/2005/06/17/seminole.support/> (accessed Oct. 25, 2006).

315. *Id.*

316. FSU U. Rel., *At FSU, Students Learn the History of University’s Namesake Tribe*, <http://www.fsu.com/>

UND recently completed construction on a new building to house the school's American Indian Center,³¹⁷ and the school currently boasts thirty-six American Indian related programs, eight American Indian publications, and seven American Indian student organizations.³¹⁸ The school also plays a video for fans at hockey and basketball contests that links the school's use of the nickname Sioux to the Native American history of North Dakota.³¹⁹ UND has also started a Sioux Scholarship Endowment.³²⁰ UND has taken affirmative steps toward appeasing critics of its Fighting Sioux nickname—short of retiring its nickname and logo—and has accomplished what the NCAA and its president, Brand, wanted to do with the mascot ban: UND has turned it into “a teachable moment.”³²¹

The NCAA utilized an arbitrary standard in considering the appeals of FSU and UND because the NCAA relied solely upon the approval of a namesake tribe and used different standards in assessing what constituted the approval of a namesake tribe. In granting FSU's appeal, the NCAA cited the approval of the Seminole Tribe of Florida but neglected to consider the Seminole Nation of Oklahoma.³²² In denying UND's appeal, the NCAA found that UND did not have the support of any namesake tribes³²³ even though the school had a resolution of approval from one namesake tribe.³²⁴

The NCAA's requirement of namesake tribe approval is consistent with federal policy regarding Indians. The federal government is currently in a “self-determination” era of Indian policy that began under Presidents John F. Kennedy and Lyndon Baines Johnson in the 1960s.³²⁵ President Richard M. Nixon famously advocated Indian self-determination in a speech to Congress in 1970³²⁶ and stated, “[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”³²⁷ Congress subsequently passed the Indian Self-Determination and Education Assistance Act of 1975,³²⁸ which permitted tribes to provide services for their members via contracts with the federal government.³²⁹ “[T]he self-determination program was broadened

pages/2006/09/19/NamesakeTribe.html (accessed Jan. 29, 2007).

317. UND, *American Indian Student Services*, <http://www.aiss.und.edu/index.htm> (accessed Jan. 30, 2007).

318. UND, *Indian Related Programs*, <http://www.und.edu/dept/aiss/tier%203/indianrelatedprograms.htm> (accessed Jan. 30, 2007).

319. UND, *Logo Appeal Downloads*, <http://www.universityrelations.und.edu/logoappeal/downloads.html>; *path* Sioux Pride Video (accessed Jan. 30, 2007).

320. Kyle Johnson, *Kupchella: Funding Not Tied to Nickname*, Grand Forks Herald A1 (June 28, 2006).

321. Brand, *supra* n. 42.

322. NCAA, *supra* n. 88.

323. NCAA, *supra* n. 23.

324. In 1996, the Spirit Lake Tribe said that it did not mind UND's use of the logo so long as it was being used to educate the public regarding issues affecting Native Americans. See UND, *Spirit Lake Tribe Res. A05-01-041*, http://www.universityrelations.und.edu/logoappeal/web_assets/DOCS/Resolution%20_large.pdf (Aug. 19, 1996).

325. David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 216–18 (5th ed., West 2005).

326. *Id.* (quoting Richard M. Nixon, *Message from the President of the United States Transmitting Recommendations for Indian Policy*, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970)).

327. *Id.* at 218.

328. Pub. L. No. 93-638, 88 Stat. 2206 (1975).

329. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 Conn. L. Rev. 777, 779 (2006) (citing Indian Self-Determination Act, Pub. L. No. 93-638, 88 Stat. 2206 (1975)).

dramatically in 1994 and recast as ‘self governance.’”³³⁰ During self-determination, “legislative changes, judicial pronouncements, and administrative responsibility” have been “entrusted to tribal governments” more than during any other period in history.³³¹ This remains current federal policy regarding Indians.³³² Given that all three branches of the federal government have worked toward empowering Indians and Indian tribes, the NCAA’s namesake tribe requirement is consistent with federal policy because it allows tribes to have the final call on whether a school can use its name to promote its athletic teams.

Unfortunately, the NCAA did not apply this exception consistently. The NCAA looked to the opinion of the tribe geographically closest to the school—the Seminole Tribe of Florida—even though there are two major Seminole tribes in the United States.³³³ The NCAA included all three Sioux tribes in North Dakota in deliberations regarding UND’s fate despite the fact that UND may have had the approval of the Sioux tribe geographically closest to its campus.³³⁴

The NCAA should have weighed the opinions of the Seminole Tribe of Florida—which approved of the use of Seminoles—and the Seminole Nation of Oklahoma—which never officially approved of the use of Seminoles—because the Oklahoma tribe is almost twice as big in population. According to the 2000 U.S. census, 273,230 Native American lived in Oklahoma while 53,541 lived in Florida.³³⁵ Well over 12,000 individuals in the United States reported that they were of Seminole decent.³³⁶ Of those Seminoles, 3,100 resided in Florida while 6,000 called Oklahoma home.³³⁷ FSU clearly has the unwavering support of the Seminole Tribe of Florida as the tribe helped design Chief Osceola’s costume and approved of his historically inaccurate props or “minor variances” as FSU calls them³³⁸—namely his horse, flaming spear, and face paint.³³⁹ The Seminole Nation of Oklahoma, however, signed on to a resolution passed by the Five Civilized Tribes³⁴⁰ which stated that the Five Civilized Tribes opposed the use of Native American mascots.³⁴¹

FSU claims it has the support of the Seminole Nation of Oklahoma.³⁴² FSU Trustee Richard McFarlain—who has served three years on the American Bar Association’s Ethics Committee³⁴³—summarized FSU’s opinion of the Seminole Nation

330. *Id.* at 780 (citing Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994)).

331. *Id.* at 225.

332. 25 U.S.C. § 450(f) (2000); *see generally* Getches, *supra* n. 326, 218–56.

333. NCAA, *supra* n. 88.

334. NCAA, *supra* n. 32.

335. *World Almanac*, *supra* n. 258, at 523.

336. *Id.*

337. Robert Andrew Powell, *Florida State Can Keep Its Seminoles*, 144 N.Y. Times D1 (Aug. 24, 2005).

338. FSU U. Rel., *The Florida State Seminoles: A Tradition of Tribute: FAQ*, <http://www.fsu.edu/~univrel/seminoles/pages/faq.html> (accessed Jan. 29, 2007).

339. *Id.*

340. The Five Civilized Tribes include the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes. *See* Five Civilized Tribes Museum, *Homepage*, <http://www.fivetribes.org/> (accessed Jan. 30, 2007).

341. Am. Indian Sports Team Mascots, *The Five Civilized Tribes Inter-Council Mascot Resolution*, <http://aistm.org/2001.civilized.tribes.htm> (July 14, 2001).

342. FSU U. Rel., *supra* n. 316.

343. FSU, *Board of Trustees: Richard McFarlain*, <http://www.fsu.edu/~trustees/trustees/>

of Oklahoma's resolution: "I could care less what the Seminole Tribe in Oklahoma think. They're in Oklahoma. . . . They got run out of here by—who was it, Andrew Jackson or somebody like that? The Trail of Tears? The real Seminoles stayed here."³⁴⁴ The NCAA all but endorsed this sentiment by neglecting to consider the Seminole Nation of Oklahoma's resolution.

In UND's situation, the NCAA determined that two tribes—the Standing Rock Sioux Tribe and the Sisseton-Wahpeton Sioux Tribe—disapproved of the school's use of Fighting Sioux.³⁴⁵ A third tribe—the Spirit Lake Tribe, which is the Sioux tribe located geographically nearest UND's campus³⁴⁶—declined to comment.³⁴⁷ Here, the NCAA took this silence as disapproval by the Spirit Lake Tribe even though it had previously drawn up a resolution giving UND permission to use the name "Fighting Sioux."³⁴⁸ Since the policy was announced, Leaders of the Standing Rock Sioux tribe—one of the tribes that the NCAA stated was against UND's nickname—have met with UND officials about whether they will give permission to UND to use the Sioux name.³⁴⁹ The Standing Rock Sioux's disapproval has also been called into question recently as members of the tribal council dispute whether the tribe has granted approval to UND for the use of the name.³⁵⁰ In deciding FSU and UND's appeals, respectively, the NCAA considered the opinion of the Seminole tribe geographically nearest FSU, and the NCAA may have incorrectly evaluated the opinion of the Sioux tribe geographically closest to UND. The NCAA should not have decided UND's appeal until it had an official statement from each tribe stating whether UND had their approval, and even the approval of one tribe should have been sufficient.

IV. OTHER CONSIDERATIONS

UND should be permitted to host NCAA championships at the Ralph Engelstad Arena and the Betty Engelstad Sioux Center despite the school's logo being prominently displayed throughout the facilities. First, decisions outside of UND's control overshadowed the construction of the facilities and required that UND remain the "Fighting Sioux" or the facilities would not be completed. Second, the NCAA has already shown approval for the facilities by hosting championship events at the facilities.

The story behind the facilities dates back to 1954 when Ralph Engelstad

mcfarlain.html (last accessed Jan. 30, 2007).

344. Steve Bousquet, *Florida State Prepares to Fight*, http://www.sptimes.com/2005/08/11/news_pf/State/Florida_State_prepare.shtml (Aug. 11, 2005).

345. NCAA, *supra* n. 23.

346. Kupchella, *supra* n. 305.

347. *Id.*

348. See UND, *supra* n. 324.

349. Ryan Bakken, *Total Nickname Support? Standing Rock Sioux Officials Give Mixed Signals*, Grand Forks Herald A1 (Apr. 28, 2006).

350. Ron His-Horse-Is-Thunder, Standing Rock Sioux Tribe Chairman, and Archie Fool Bear, Standing Rock Sioux Judicial Committee Chairman, disagree on whether tribal members support UND's use of the name. Fool Bear asserted that "his committee and residents in six of the reservation's eight districts overwhelmingly supported the nickname." *Id.* A meeting between the tribal council included both leaders calling for the other's resignation over the issue. James McPherson, *Standing Rock Sioux Table Talks—But Not before Council Members Call for Each Other's Removal*, Grand Forks Herald A1 (May 5, 2006).

(Engelstad) graduated from UND after playing for the school's hockey team.³⁵¹ In 1967, he sold 145 acres of land to Howard Hughes who used it to build North Las Vegas Airport.³⁵² Engelstad went on to become a multi-millionaire in the real estate and contracting business and his fortune later multiplied after he became involved in hotels and casinos.³⁵³ In the late 1990s, Engelstad announced that he would donate \$100 million to build a new hockey arena and a basketball and volleyball arena for UND's athletic department.³⁵⁴ After construction on the facilities began, Kupchella appointed a commission to investigate whether UND should keep the Fighting Sioux as its nickname.³⁵⁵ After receiving the commission's report in late 2000, Kupchella stated that he would announce his decision on whether to change UND's nickname and logo in January of 2001.³⁵⁶

Engelstad discovered that Kupchella was considering changing UND's nickname and shared his feelings with school's president.³⁵⁷ In correspondence dated December 20, 2000, Engelstad informed Kupchella that he would stop construction on the arena if Kupchella decided to retire the Fighting Sioux nickname.³⁵⁸ "I have spent . . . in excess of \$35,000,000.00 . . . but I will take my lumps and walk away. . . . I am sure it will be the number one building never brought to completion at a school of higher education due to your changing the logo and the slogan."³⁵⁹ The day after receiving the letter, the North Dakota State Board of Higher Education—not UND or Kupchella—voted unanimously to keep the Fighting Sioux nickname.³⁶⁰ The building opened in 2001. Engelstad died on November 26, 2002.³⁶¹

It is not difficult to see a major reason why UND opted to keep its Fighting Sioux nickname—it wanted the new facilities. UND needs a facility like Engelstad Arena in order to compete against better-funded Division I institutions in men's ice hockey. The school has announced that it will make the move to Division I athletics in all sports during the 2007–2008 academic year,³⁶² and the Betty Engelstad Sioux Center will be an equalizer for men's basketball, women's basketball, and volleyball. UND made the same choice almost any other university would have, and the NCAA should not punish UND's student-athletes because it did what any other college or university would have done and acquiesced to the opinions of a deceased alumnus who played a powerful role in university politics.

351. Andrew Brownstein, *A Battle over a Name in the Land of the Sioux*, Chron. Higher Educ. A46 (Feb. 23, 2001).

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. Brownstein, *supra* n. 351.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*; see also N.D. U. System, *Minutes—December 21, 2000*, http://www.ndus.nodak.edu/uploads%5Cdocument-library%5C272%5C12-21-00_board_minutes.pdf (Dec. 21, 2000).

361. Ralph Engelstad Arena, *Ralph Engelstad*, <http://www.theralph.com/asp/default.asp?p=23> (accessed Jan. 30, 2007).

362. UND, *UND to Move All Athletic Programs to Division I*, <http://www2.und.edu/our/news/story.php?id=1833> (June 21, 2006).

Furthermore, the NCAA has already profited from these facilities. As mentioned above, the NCAA has awarded at least thirteen championship events to UND in the last six years.³⁶³ Several of these events were played in the facilities built with Engelstad's money, including a highly coveted men's ice hockey regional.³⁶⁴ The NCAA clearly benefited from UND hosting NCAA championship events at these facilities.

V. CONCLUSION

UND embodies the spirit of amateurism and the successful balance of academics and athletics that are so proudly touted by the NCAA. While leaders in higher education differ on the question of whether Native American imagery should be used in promoting athletic teams, the NCAA sided with those opposing the use of Native American imagery in setting forth its policy. Unfortunately, the NCAA fell short of the movement's goal of eliminating Native American imagery from its championships by kowtowing to institutions with stronger political ties and more power in the NCAA's decision-making process. UND faces a potentially insurmountable obstacle in court when it argues that the NCAA has breached the implied covenant of good faith and fair dealing with UND by arbitrarily and capriciously applying its policy. A comparison of FSU and UND, however, shows how FSU flaunts the NCAA's policy while UND has attempted to make a "teachable moment" out of its use of Native American imagery. The NCAA arbitrarily used the powers granted to it by its members to punish schools that have promoted the very ideals endorsed by the NCAA, and UND should be able to deal with the consequences of using Fighting Sioux as its nickname without the NCAA's involvement.

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363. UND Athletics, *supra* n. 19.

364. Mark Bedics, *Tickets for Division I Men's Ice Hockey Regionals to Go on Sale*, http://www2.ncaa.org/portal/media_and_events/press_room/2005/september/20050929_mih_tickets_rls.html (Sept. 29, 2005).

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